Supreme Court, U.S.
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No. 971435

In The
Supreme Court of the United States

October Term, 1997

MARGARET DONG,

Petitioner,

vs.

SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM & SCULPTURE GARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Smithsonian Institution is an "authority of the Government of the United States" so as to constitute an "agency" subject to the Freedom of Information Act and the Privacy Act, where the Smithsonian Institution: is subject to substantial Federal control over its operations; receives the majority of its funding from the Federal Treasury; employs Federal civil servants as the vast majority of its work force; is responsible to various Federal authorities for fiscal accountability; and promulgates and enforces regulations governing the conduct of patrons and the protection of property belonging to the United States?

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Petitioner Margaret Dong respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Dong v. Smithsonian Institution*, No. 96-5303, 125 F.3d 877 (D.C. Cir. 1997). (App. A). The relevant opinion of the United States District Court for the District of Columbia is reported at *Dong v. Smithsonian Institution*, No. 94cv00628, 878 F. Supp. 244 (D.D.C. 1995)(*Dong I*). (App. B).

STATEMENT OF JURISDICTION

Invoking Federal jurisdiction under 5 U.S.C. § 552a(g)(1) and 28 U.S.C. § 1331, the petitioner brought this suit in the U.S. District Court for the District of Columbia. On February 28, 1995, the District Court denied the respondent's motion for summary judgment, and ruled that the Smithsonian Institution was an "agency" subject to the Privacy Act. *Dong I*, 878 F. Supp. at 250; (App. B). Judgment was entered in petitioner's favor on October 31, 1996. *See Dong v. Smithsonian Institution*, 943 F. Supp. 69 (D.D.C. 1996)(*Dong II*).

On respondent's appeal, the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals" or "D.C. Circuit") on October 17, 1997, entered a judgment and an opinion reversing the District Court's holding, and ruled that the Smithsonian Institution was not an agency subject to the Privacy Act. *Dong*, 125 F.3d at 883; (App. A).

Thereafter, the petitioner timely filed a petition for rehearing. On December 3, 1997, the Court of Appeals denied the petitioner's request for rehearing and suggestion for rehearing *in banc* in an order that contained a concurrence, joined by two judges, noting their doubts about the panel's conclusion. (App. C)(*See also* App. D)(Court of Appeals' Judgment).

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Privacy Act, 5 U.S.C. § 552a(a)(1), provides the following, in pertinent part:

> the term "agency" means agency as defined in section 552(e)[1] of this title;

The Freedom of Information Act, 5 U.S.C. § 552(f), provides the following, in pertinent part:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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1 Section 552(e) referenced in § 552a(a)(1) was redesignated § 552(f) of title 5 by section 1802(b) of Pub. L. No. 99-570.

The Administrative Procedure Act, 5 U.S.C. § 551(1), provides the following, in pertinent part:

> "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title-
>
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
>
> (F) courts martial and military commissions;
>
> (G) military authority exercised in the field in time of war or in occupied territory; or
>
> (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2) of title 50, appendix.

STATEMENT OF THE CASE

The material facts in this case are not in dispute. Margaret Dong, a Federal civil servant assigned to the Smithsonian

Institution's Hirshhorn Museum and Sculpture Garden in the position of Museum Registration Specialist, instituted this action against her employer, the Smithsonian Institution (SI or "the Smithsonian"), for damages under the Privacy Act, 5 U.S.C. § 552a. Ms. Dong claimed that the SI violated § 552a(e)(2) of that Act in the manner in which it conducted an investigation into alleged misconduct by Ms. Dong. Section 552a(e)(2) requires Federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from that individual "to the greatest extent practicable."

One of the duties of Ms. Dong's employment includes serving as a courier for works of art the Hirshhorn lends to other museums. The SI's investigation concerned a trip Ms. Dong made while acting as a courier. At no time prior to contacting private sector museum officials at the Museum of Modern Art and the Metropolitan Museum of Art, which are both located in New York, did the SI's supervisors contact Ms. Dong about her alleged misconduct or inquire as to her version of events. As a result of the SI's violation of her the Privacy Act rights, Ms. Dong claimed that she suffered damages including, *inter alia*, loss to her professional reputation.

The Smithsonian defended the petitioner's suit on the grounds, among others, that the SI was not an agency covered by the FOIA, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, and moved for summary judgment in its favor.

A. The Characteristics of the Smithsonian Institution

Crucial to answering the question presented are the nature and degree of the ties that the SI has with the Federal government,

the degree of Federal government control that exists over the operations of the SI, and the degree to which the SI exercises independent decision-making authority in the exercise of specific governmental functions.

1. Ties To The Federal Government

The record in this case reflects that the SI was chartered by an Act of Congress, for the "increase and diffusion of knowledge" among people. 20 U.S.C. § 41.

From its establishment in 1846, when Congress accepted the property of James Smithson in trust for the creation of an institution "for the increase and diffusion of knowledge among men," the Smithsonian has metamorphosed into an entity largely dependent upon the Federal Treasury to operate, Federal civil servants to provide its work force, and the Federal Government for gifts of national treasures and artifacts belonging to the United States to study, display, and preserve.

In that regard, approximately two-thirds of the Smithsonian's staff, *i.e.*, over 4,000 employees, are -- like Ms. Dong -- civil service employees of the Federal Government. *See Dong II*, 943 F. Supp. at 73; *see also Cotton v. Heyman*, 63 F.3d 1115, 1122 (D.C. Cir. 1992)(noting that the Smithsonian "has a staff of which 70% are Federal employees"). Almost all of the Federal employees of the Smithsonian receive health insurance and retirement benefits under the provisions of 5 U.S.C. Chapters 83, 84, and 89, *i.e.*, the Civil Service Retirement System and the Federal Employees Retirement System. Several ranking Smithsonian officials are employees of the Senior Executive Service. 5 U.S.C. §§ 5315, 5716. The Smithsonian and its Federal employees are subject to the Civil

Service Reform Act of 1978. 5 U.S.C. §§ 1101-8913. The Office of Personnel Management (OPM) is responsible for investigating and determining the suitability of all Smithsonian employees by conducting background investigations of both the SI's Federal civil service and trust fund employees.

The SI is considered to be a Federal agency for many other purposes of the Federal civil service system. For example, like most employees in the Federal civil service, the Smithsonian's civil service employees are entitled to disciplinary and adverse action appeal rights to the Merit System Protection Board, *see* 5 U.S.C. § 1201 *et seq.*; 5 C.F.R. Part 1200. The SI has also been held to be a Federal agency under the Federal Labor-Management Relations Statute, (FLMRS) 5 U.S.C. § 7101 *et seq.*, giving collective bargaining rights to SI employees.

Furthermore, the SI has been held to be an agency for Federal property transfer privileges under the Federal Property and Administrative Services Act of 1949, *see* 40 U.S.C. § 483(b); 63 Stat. 377, *as amended* 40 U.S.C. § 252, and in the Reorganization Plan No. 18 of 1950, 5 U.S.C. § 133z-15 note. *See also* 45 Comp. Gen. 685, 686 (1966)(holding the same). Moreover, the SI has been held to be an agency under the Federal Torts Claims Act (FTCA). *See Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Institution*, 566 F.2d 289, 296 (D.C. Cir. 1977)(*in banc*), *cert. denied*, 438 U.S. 915 (1978).

2. Federal Control

As to the Federal control over the day-to-day operations of the SI, the Secretary of the Smithsonian must "submit to Congress ... a detailed statement of the expenditures of the preceding

fiscal year." 20 U.S.C. § 49. The Treasury Department keeps "[a]ll moneys recovered by or accruing to [the Smithsonian]." 20 U.S.C. § 53. Moreover, seventy-five percent of all of the Smithsonian's operating and maintenance costs are derived from Federal funds. *Expeditions Unlimited*, 566 F.2d at 296 n.4. Furthermore, the Smithsonian receives a vast amount of other Federal funding, which it then disburses to its various programs. *Id.* n.4 (finding that "[a]pproximately 75% of the Institution's operating funds come from Federal appropriations); *General Hearings Before the Sub-Committee on Library and Memorials*, 91st Cong., 2d Sess., 321, 323 (1970). For fiscal year 1993, the Smithsonian was appropriated at least $347,459,000 from the Federal Treasury. *See* Pub. L. No. 102-381 (Oct. 5, 1992). In fiscal year 1994, the Smithsonian was appropriated at least $342,384,000 from the Federal Treasury. *See* Pub. L. No. 103-138 (Nov. 11, 1993).

The budget for the Smithsonian from Federal funds is published in the Federal Government document entitled "Budget of the United States Government" issued by the "Executive Office of the President of the United States, Office of Management and Budget." (*See e.g., Dong v. Smithsonian Institution*, No. 96-5303 (D.C. Cir. 1997), Joint Appendix (JA) 374-75).[2] The Smithsonian's allocation from "Federal funds" is listed in that Federal Government "Budget" under the section headed "Other Independent *Agencies*." *Id.* (emphasis added).

The Smithsonian's budget, like that of other Federal agencies, is submitted to Congress through, and negotiated with, the Office of Management and Budget and the President. In this

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2 References to the Joint Appendix filed with the Court of Appeals will be cited as "JA __."

regard, the Smithsonian must also comply with 31 U.S.C. § 3513 (requiring "executive agencies" to receive the Comptroller General's approval for the planned use of private funds when the Smithsonian's appropriations requests are submitted).

The Smithsonian is also subject to multiple reporting requirements and extensive day-to-day oversight by the Federal Government. For example, the Smithsonian is statutorily subject to the financial reporting requirements found at 20 U.S.C. §§ 57, 58, 65(a), 77(c), 79(b), 83, concerning the disbursement of Congressionally-appropriated funds. In addition, the Smithsonian must comply with the Federal Managers' Financial Integrity Act, which applies to executive agencies. *See* 31 U.S.C. §§ 1105, 1113, 3512 (concerning Federal budget submissions and agency accounting systems). The Federal Government's financial control over the Smithsonian was fortified with the 1988 Amendments to the Inspector General Act of 1978. 5 U.S.C. App 3; Pub. L. No. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended by Pub. L. No. 100-504, Title 1, Oct. 18, 1988, 102 Stat. 2515. As with the Inspectors General of other Federal agencies, the Act requires the SI's Inspector General (IG) to: conduct and supervise audits of the SI's programs and operations; report violations of criminal law to the Attorney General; submit semiannual reports to Congress summarizing the IG's activities and identifying abuses found in the SI with recommendations for corrective action, etc. The SI is required to permit the IG access to all records, reports, audits, and other papers concerning the SI's programs and operations, and is required to furnish the IG with adequate office space, supplies and equipment. *See* 5 U.S.C. App 3, §§ 2, *et seq.*

In addition, Congress has mandated that various types of property belonging to the United States be deposited in the Smithsonian, including military equipment and arms. *See* 20 U.S.C. §§ 59-60. Additionally, Congress has mandated various aspects of the Smithsonian's organization and management. For example, with regard to the SI's National Air and Space Museum, Congress has mandated its establishment, its administration, and its function as a repository for historically-important government property relating to space and air travel. *See* 20 U.S.C. §§ 77-77d.

3. Independent Authority

As to the Smithsonian's independent administrative and decision-making authority, acting under regulatory authority delegated it by Congress, the SI promulgates and enforces rules and regulations that it publishes in the Code of Federal Regulations. *See* 36 C.F.R. Part 504.[3] Furthermore, the Smithsonian's police, which are established and hired pursuant to Congressional statute, have been armed by Congress with full Federal police decision-making powers to carry firearms, make arrests, and enforce all Federal criminal law on the Smithsonian's property. 40 U.S.C. § 193t. Additionally,

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3 Each volume of the Code of Federal Regulations is prefaced by the following statement: "The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and *agencies of the Federal Government*." *See, e.g.*, 36 C.F.R. (emphasis added); *see also* 36 C.F.R. § 504.1-16; 36 C.F.R. § 520.1-18; 36 C.F.R. § 530-1 (Smithsonian's regulations). Moreover, the Smithsonian is expressly listed in the Code of Federal Regulations as an *agency of the Federal government* that publishes regulations therein. *See* 5 C.F.R. Parts 1-699, at 710 (1997).

Congress has expressly permitted the Smithsonian to promulgate additional protective regulations and to publish them in the Federal Register. *Id.* §§ 193(s) and (r). Congress has also provided that, in addition to security and visitor protection, the Smithsonian, through its Office of Protection Services, is responsible for enforcement of *all Federal law* on Smithsonian premises. *See id.* §§ 193n-x.

In addition, the Smithsonian has promulgated and published regulations banning discrimination with respect to access to any of the SI's facilities. Specifically, the SI's regulations state the following:

> There shall be no discrimination by segregation or otherwise against any person or persons because of race, religion, color, or national origin in furnishing or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided thereby on the premises.

36 C.F.R. § 520.16.

Violations of the Smithsonian's regulations constitute violations of Federal law and are "punishable by a fine of not more than $100 and/or by imprisonment for not more than 60 days" or, "if property is damaged in an amount exceeding $100, the amount of the fine for the offense may be not more than $5,000, the period of imprisonment for the offense may be not more than 5 years." 36 C.F.R. § 520.18; (JA at 237). Moreover, prosecution of those regulatory violations involving

property damage in an amount exceeding $100 is had in the U.S. District Court. *See* 40 U.S.C. § 193s; 36 C.F.R. § 520.18.

B. The District Court's denial of the Smithsonian Institution's Motion for Summary Judgment.

The District Court found that the SI has sufficient and numerous Federal ties and control, as well as independent authority, to compel a finding of agency status under the Privacy Act. In so holding, the District Court found that the SI: has a majority of Federal civil service employees; receives representation from the U.S. Attorney; enjoys absolute Federal governmental immunity in libel suits; receives a vast amount of Federal funding; is subject to General Accounting Office audit and reporting requirements; enjoys Federal status in taxes and property transfers. More specifically, the District Court found that seventy-five percent of all of the Smithsonian's operating and maintenance costs are derived from Federal funds. The SI must submit to Congress a detained statement of expenditures. The District Court also found that the SI possesses independent decision-making authority. The SI possesses police powers to enforce its regulations concerning its grounds, and to punish the violations of its regulations. Congress authorized the SI to enter into contracts. The members of the SI's Board of Directors are either themselves Federal Government officials or else are selected by Federal officials. Additionally, the District Court found that the SI holds itself out to its employees as subject to the Privacy Act on certain employment forms. *Dong I*, 878 F. Supp at 249.

The District Court also found that the SI performs governmental functions as a center of scholarship and a national museum responsible for the safekeeping and

maintenance of national treasures. The District Court found that, as the country's national museum, the SI "controls information of interest to the public." *Id.*

The District Court held that all of these facts about the operation and legal status of the SI, when "taken together, lead to the conclusion that the Smithsonian enjoys sufficient Federal involvement and independent decision-making authority to merit agency status under FOIA." *Id.* The District Court concluded that "[w]hen the Court examines the Congressional purposes of the Privacy Act and the FOIA, along with the myriad connections between the Smithsonian and the Federal government, it simply blinks reality to conclude that the Smithsonian is not a Federal agency." *Dong I*, 878 F. Supp. at 250.

The District Court denied the SI's motion for summary judgment and held that the SI was an agency subject to the requirements of the Privacy Act. (App. B).

C. Judgment of the District Court.

After a trial on the merits, the District Court concluded that the SI had violated § 552a(e)(2) of the Privacy Act. *Dong II*, 943 F. Supp. at 75. The District Court further concluded that the SI's violation was intentional and willful because the SI had intentionally ignored a prior District Court ruling that the SI was a Federal agency for purposes of the FOIA. *See Cotton v. Adams*, 798 F. Supp. 22 (D.D.C. 1992). The District Court lastly concluded that the petitioner suffered harm to her reputation as a consequence of the SI's violation. *Dong II*, 943 F. Supp. at 74.

The SI appealed that judgment to the Court of Appeals arguing, *inter alia*, that the SI does not engage in the functions that government authorities perform. The SI argued that, in order to be an "authority of the government," an entity must be generally independent in the exercise of its functions and possess legal authority to take final and binding action affecting the rights and obligations of individuals. The SI claimed that it does not issue rules of general application that bind the public and engages in no general regulatory functions. Additionally, the SI argued that, the fact that the SI derived support from private funds, suggests that it is not an authority of the United States.

In response to the appeal, the petitioner presented a record and argument demonstrating that the SI was subject to day-to-day Federal control and was a governmental entity with substantial independent decisional authority in the exercise of specific governmental functions, which warranted status as an authority of the government under the Privacy Act.

D. Judgment of the Court of Appeals.

The Court of Appeals reversed the District Court's holding that the SI was an authority of Government of the United States, and, thereby, concluded that the SI was not an agency subject to the Privacy Act. The Court of Appeals focused its analysis on whether the SI exercises "substantial independent authority" in order for it to be considered an agency for purposes of 5 U.S.C. § 551(1). *Dong*, 125 F.3d at 881. The Court of Appeals held that the SI issues no orders and performs no regulatory functions. The Court of Appeals found that the SI's authority to promulgate regulations to maintain safety and order on its premises falls short of converting the SI into an

authority of the Government of the United States. The Court of Appeals noted that the Smithsonian's ability to hire its own police force carried little weight because private museums employ their own security personnel. *Id.* at 882. The Court did not discuss the fact that the SI's police possess Federal powers of arrest for violations of Federal law, nor did the Court address the substantial day-to-day Federal control over the SI's operations.[4]

The petitioner timely filed a petition for rehearing and a suggestion for rehearing *in banc*, both of which were denied. (App. C). Circuit Judge Wald issued a concurring opinion, joined by Judge Tatel, which stated the following:

> Although I have considerable doubts about the panel's conclusion that the Smithsonian Institution is not an "authority of the Government of the United States," I do not think an *in banc* hearing would render any different result. I hope that the Supreme Court (or the Congress) will take a hard look at the issue."

(App. C).

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4 The Court of Appeals also held that the SI was not an agency in the executive branch, which status would, alternatively, confer agency status under 5 U.S.C. § 552(f). *Dong*, 125 F.3d at 879 (stating that "to be an agency under the Privacy Act, an entity must fit into *one* of the categories set forth *either* in § 552(f) [*i.e.*, an establishment in the executive branch of the Government] *or* § 551(1)[*i.e.*, an *authority* of the Government])(emphasis added). The petitioner does not challenge that holding in this petition.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, THAT THE SMITHSONIAN INSTITUTION IS NOT AN "AUTHORITY OF THE GOVERNMENT OF THE UNITED STATES" AND CONSEQUENTLY NOT AN AGENCY SUBJECT TO THE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT, RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

In holding that the SI is not an "agency" for purposes of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, the Court of Appeals has too narrowly interpreted the statutory phrase "authority of the Government of the United States." 5 U.S.C. § 551(1). As a consequence of the Court of Appeals' holding, the SI's employees, the majority of whom -- more than 4,000 -- are Federal civil service employees, are now without the protections of the Privacy Act that are afforded to all other similarly-situated Federal civil service employees. Furthermore, as a result of the SI's limited liability as an agency covered by the FTCA, and as a result of the Court of Appeals' decision in the instant case, the Smithsonian's employees are now also prevented from enforcing what Congress has deemed the fundamental constitutional right to privacy expressly protected by the Privacy Act. *See* Section 2(a)(4), Privacy Act, 5 U.S.C. § 552a note, *reprinted in* 1974 U.S.C.C.A.N. at 2178. Moreover, due to the Court of Appeals' ruling, the SI is no longer accountable to the public for the conduct of its operations, under the FOIA, nor must the SI respond to FOIA requests from citizens, including students and scholars, about the national treasures it possesses or the

historical or geological research it undertakes on behalf of the Government of the United States. Furthermore, the Court of Appeals has ignored the Federal Government's well-established day-to-day supervisory control over the SI and has misapprehended the substantial independent governmental authority that the SI exercises in the performance of its specific governmental functions, both of which are incidents of "Federal agency" status. Thus, this case raises important questions of Federal law which have not been, but should be, settled by the Supreme Court.

The FOIA and the Privacy Act apply to Federal agencies. For definitional purposes, FOIA and the Privacy Act cross-reference the definition of "agency" under the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 552a(a)(1), 552(f), 551(1). The APA provides that the term "'agency' means each *authority of the Government of the United States*, whether or not it is subject to review by another agency." 5 U.S.C. § 551(l)(emphasis added). As noted in the Court of Appeals' decision in this case, the term "authority" is not self defining. *See Dong*, 125 F.3d at 881. The Court of Appeals stated in its decision in this case that "it seems logical that for an entity to be an authority of the government it must *exercise* some governmental authority." *Id.* The Court of Appeals then leapt to the finding that the exercise of government authority must equate with the issuance of binding rules of general application or determining rights and duties through adjudication. *See id.* at 882. The Court of Appeals concluded that the SI was not an "authority of the government of the United States" merely because it allegedly issues no orders and performs no regulatory functions. *Id.* at 882-83. For the following reasons, this Court should reverse that conclusion as erroneous.

This Court has not yet defined the statutory phrase "authority of the Government of the United States," as stated in the APA. However, the Court has recognized that the term "'agency' is *broadly* defined to mean '*each* authority of the Government of the United States,' except the Congress, the courts, territorial governments, the government of the District of Columbia ...." *The Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 16 (1974)(adopting the analytical approach advanced by the petitioner in the instant case)(emphasis added).

In *Expeditions Unlimited*, the D.C. Circuit decided, *in banc*, that the SI was an agency under the Federal Torts Claim Act (FTCA). 566 F.2d at 296. The court reasoned that the SI's "nature and function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight make the institution an 'independent establishment of the United States.'" *Id.* (footnotes omitted). Under the FOIA and Privacy Act, the SI need not be an "independent establishment," but need only be an "authority" of the Government of the United States. The FOIA and Privacy Act definition of agency is a broader, more encompassing, term than the term "independent establishment" used in the FTCA. Moreover, because the SI is not expressly excluded from the definition of agency under the APA, it should be included, as it exercises substantial independent administrative authority in conducting specific governmental functions, and because it is subject to substantial Federal supervision and control on a virtual day-to-day basis. *See The Renegotiation Bd.*, 415 U.S. at 16.

A. The Smithsonian Is An Agency Because It Is Subject To Virtual Day-To-Day Federal Control Over Its Operations.

That the SI should be considered a Federal agency for purposes of the FOIA and Privacy Act is manifest from a reading of this Court's opinion in *Forsham v. Harris*, 445 U.S. 169 (1980). In *Forsham*, the Court held that private organizations receiving Federal funds did not meet the FOIA's definition of "agency." The Court noted that the FOIA's legislative history unequivocally indicated congressional intent to exclude organizations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it.[5] Conversely, in the present case, not only is the SI Federally chartered, to a great extent, it is Federally controlled as well. Specifically, the vast majority of the SI's funding comes from the Federal Treasury; the SI's budget must be negotiated with the Office of Management and Budget; the SI must comply with Federal auditing requirements; the SI must designate an IG to audit its operations; the pay of the SI's Assistant Secretaries for History and Science are determined by the Congress, 5 U.S.C. § 5315, as is the pay for three-fourths of the SI's employees who are Federal civil servants. Additionally, Congress has dictated the establishment of various museums, mandated their purposes, provided for their receipt of Federal property, and outlined the duties of their various SI-employed officials.

For example, Congress established the National Air and Space Museum which "*shall memorialize* the national development

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5 The example cited by the Court was the Corporation for Public Broadcasting.

of aviation and space flight; *collect, preserve and display* aeronautical and space flight equipment of historical interest and significance; [and] *serve* as a repository for scientific equipment and data ...." 20 U.S.C. § 77a (emphasis added). Furthermore, Congress mandated the establishment of a National Armed Forces Museum and that:

> The Smithsonian Institution *shall* commemorate and display the contributions made by military forces of the Nation .... The Smithsonian Institution *shall* interpret through *dramatic display* significant current problems affecting the Nation's security. It *shall* be equipped with a study center for scholarly research .... In fulfilling its purposes, the Smithsonian Institution *shall* collect, preserve and exhibit military objects of historical interest and significance."

20 U.S.C. §§ 80a and b (emphasis added). No mere private museum is subject to such direct and detailed operational control by the Federal Government.

Additionally, the Secretary of the SI has been directed to "inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution." 20 U.S.C. § 80q-9(a). The Congress even dictates the use for all of the proceeds that the SI earns from concessions at the National Zoo. 20 U.S.C. § 85. Thus, in innumerable ways, the Federal Government controls the day-to-day functions of the SI.[6] When the statutes creating the various museums within the SI are reviewed, *e.g.*, the National

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6 The provisions creating various SI museums or centers, and mandating their functions, are generally found at 20 U.S.C. §§ 59-85.

Armed Forces Museum, it cannot be seriously denied that the business of the United States is being carried out through virtual day-to-day Federal directions to the SI on what, and how, it is to display elements of our nation's security, history, and culture. Therefore, under *Forsham* the SI would meet the definition of Federal agency, because it is Federally chartered, receives Federal funds, and is controlled by the Federal Government.

Moreover, in *Forsham* the Court noted that, in the context of Federal grantees, the receipt of Federal funds alone does not serve "to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed and virtually day-to-day supervision." 445 U.S. at 180. It is undeniable that the SI is under extensive, detailed, Federal supervision. Furthermore, to the extent the SI is viewed as a government grantee, *Forsham* teaches that the acts of the SI are governmental, given the extensive, detailed, and virtually day-to-day Federal supervision outlined herein. Unlike the two District Courts that evaluated the SI's ties to the Federal government,[7] the Court of Appeals failed to properly apprehend the SI's receipt of Federal funding, and the fact that it is subject to considerable Federal supervision and control, as indicia of agency status under the APA, FOIA, and the Privacy Act.

Additionally, in *Rocap v. Indiek*, 539 F.2d 175 (D.C. Cir. 1976), a case factually similar to the instant one, the Court of Appeals, in holding that FOIA's definition of agency applied to "hybrid governmental/private entities," found two facts compelling in holding that the Federal Home Loan Mortgage

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7 *Cotton v. Adams*, 798 F. Supp. 22 (D.D.C. 1992); and *Dong I*, (App. B).

Corporation (FHLMC) was covered by the FOIA: 1) that the Corporation had a Federal Charter; and, 2) the Corporation also was subject to "substantial Federal control over its day-to-day operations." *Id.* at 177. In the situation of a hybrid governmental/private entity, the Court of Appeals concluded that the proper inquiry to be made in determining if an entity constitutes an agency under FOIA and the Privacy Act is the amount of Federal control. In making this determination, the *Rocap* court engaged in the following analysis:

> The organizational structure of the Corporation exhibits many characteristics similar to those of other governmental entities subject to the Freedom of Information Act. It is Federally chartered, its Board of Directors is Presidentially appointed, it is subject to close governmental supervision and control over its business transactions, and to Federal audit and reporting requirements. In addition, the Corporation is expressly designated as an "agency," and its employees are officers and employees of the United States, for a number of purposes. Like other agencies, it is empowered "to make and enforce such bylaws, rules, and regulations as may be necessary or appropriate to carry out the purposes of [its enabling act.]" (citation omitted).

Rocap, 539 F.2d at 176.

Except for the sole fact that the membership of SI's Board of Regents is not chosen by the President, but rather is mandated by Congress, the "Federal control" characteristics of the SI are

remarkably similar to those of the FHLMC's. If this Court permits the Court of Appeals' decision in the instant case to stand, lower courts and individuals will be left to believe that the issue of presidential appointments are determinative of the issue of "agency" status, regardless of the degree of Federal funding, Federal supervisory control over day-to-day operations, and the governmental authority exercised by the Federal entity under examination. Notwithstanding, nothing in the legislative history of FOIA and the Privacy Act, nor in any case law the petitioner has reviewed, reveals that a Federal entity, otherwise not expressly excluded from the FOIA or the Privacy Act, should be excluded merely because its operating board is not selected by the President.[8]

Greater confusion of the law exists based upon the respondent's faulty comparison between *Rocap* and the decision of the Ninth Circuit in *Irwin Memorial Blood Bank v. American Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1981). The issue in *Irwin Memorial* was whether the American Red Cross was an agency under FOIA. The Ninth Circuit held that the Red Cross was not an agency subject to FOIA. Although the Red Cross is Federally chartered and the President appoints members to the Red Cross Board of Governors, the Ninth Circuit found that the Red Cross lacked the requisite Federal control to constitute an agency under FOIA. Specifically, the court noted that the employees of the Red Cross are not

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8 In fact, the President is not without some role in appointing SI officials. For example, the Woodrow Wilson International Center for Scholars was established by Congress within the SI. *See* 20 U.S.C. § 80f(a). Notably, the President designates the Chairman and Vice Chairman of the Center's Board of Trustees and appoints eight of the sixteen members of the board. 20 U.S.C. §§ 80f(b) and (e).

employees of the United States, the United States does not appropriate *any* funds to assist the Red Cross in implementing its powers and duties, and governmental officials do not direct the everyday affairs of the Red Cross. 640 F.2d at 1056. Consequently, the Ninth Circuit held that the appointment of governing officials by the President is not dispositive of agency status. The clear lesson from *Rocap* and *Irwin Memorial* is that a quasi-government/private entity does not take on agency status unless it has the "requisite magnitude of Federal control," regardless of the President's role in appointing the directors of the entity. Yet, in reading the Court of Appeals' decision in the instant case, the magnitude of Federal control over the SI was not even considered in determining the SI's status as an agency for FOIA and Privacy Act purposes. The Supreme Court must act to clear up this confusion in the law.

B. The Smithsonian Is An Agency As It Is An Administrative Unit That Possesses Substantial Independent Governmental Authority In The Exercise Of Specific Functions.

Separately, the Court of Appeals' decision that the SI is not an "authority" because it does not perform rule-making or adjudicatory functions is incorrect and creates further confusion for courts and individuals trying to determine which of a numerous variety of Federal entities are "agencies." In addition, the Court of Appeals' decision fails to appreciate the vast ways in which agencies can conduct business on behalf of the Government of the United States. Specifically, in *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990), the Court of Appeals found that the Defense Nuclear Facilities Safety Board qualified as an

authority of the United States under the FOIA and Privacy Act, merely because it performed investigative and evaluative functions.

Notwithstanding, in the instant case, the Court of Appeals equated governmental authority with simply rule-making and adjudication. However, those activities have never been the only hallmarks of governmental authority. Specifically, in *Soucie v. David*, 448 F.2d 1067, 1973 (D.C. Cir. 1971), a case involving the Office of Science and Technology, which was created to evaluate the scientific research programs of Federal agencies, the Court of Appeals stated that:

> While the primary purpose of the APA is to regulate the processes of rule making and adjudication, administrative entities that perform *neither* function are nevertheless agencies, and therefore subject to the public information provisions of the APA, *i.e.*, the [FOIA and Privacy Act].

Soucie, 448 F.2d at 1073 (emphasis added); *see also Meyer v. Bush*, 981 F. 2d 1288, 1292 (D.C. Cir. 1993). Under *Soucie*, an entity need only qualify as "*any administrative unit* with substantial independent authority in the exercise of specific functions" to constitute an agency under the Privacy Act. *Soucie*, 448 F.2d at 1073; *see also Meyer*, 981 F.2d at 1292. Therefore, contrary to the Court of Appeals' rationale in the instant case that the Smithsonian must "make binding rules of general application or determine rights and duties through adjudication" to constitute an agency under the Privacy Act, prior precedent has held that an entity need not engage in either rule-making or adjudication to be considered an authority of

the Government of the United States, and, consequently, an agency under the FOIA and Privacy Act. Yet, it is that narrow path that the Court of Appeals has taken to shield the SI from agency status as an authority of the Government of the United States.

As a result, the D.C. Circuit, which holds jurisdiction over almost every Federal agency, given its geographical jurisdiction over the seat of Federal government, has now so muddled the definition of "agency" under the FOIA and Privacy Act for other courts and the public that the Supreme Court should speak with its authoritative voice to provide the guidance needed to courts and the public to enable them to better determine which Federal entities are agencies under the APA, FOIA, and the Privacy Act.

Nevertheless, the Court of Appeals' determination that the SI makes no binding rules of general application and performs no regulatory functions, and is therefore not an "authority," misstates and trivializes the SI's police and other rule-making powers. The regulations that the Smithsonian promulgates and publishes in the Code of Federal Regulations are binding rules of Federal law that prohibit the general public from, *inter alia*, creating nuisances, carrying weapons on Smithsonian property, or entering its premises or operating a vehicle thereupon while intoxicated, etc. Furthermore, Congress has provided that, in addition to security and visitor protection, the Smithsonian, through its Office of Protection Services, is responsible for enforcement of *all* Federal law on Smithsonian premises. *See* 40 U.S.C. §§ 193n-x. Moreover, the SI possesses decisional police powers to enforce its regulations concerning its grounds, to designate special police, and to arrest and punish violators of its regulations. 40 U.S.C. §§ 193n, 193r, 193s, 193t. Under its

statutory Federal police powers, the Smithsonian's special police may be furnished with uniforms, badges, revolvers, and ammunition, so as to enforce the law through its Federal arrest authority. *Id.* § 193t. Furthermore, Congress has expressly permitted the Smithsonian to promulgate additional protective regulations and to publish them in the Federal Register. *Id.* §§ 193(s) and (r).

In the instant case, the Court of Appeals dismissed the SI's police authority as an incident of governmental authority finding it "carries little probative weight in that many private museums employ their own security personnel." *Dong*, 125 F.3d at 882. Although it is true that many private museums employ their own security personnel, such private museum personnel do not enforce *all* Federal law and possess Federal arrest authority, like the police employed by the Smithsonian. *See* 40 U.S.C. § 193t. To deny the governmental authority of the SI on the grounds that its police are analogous to security guards employed by private museums, would be the same as denying the governmental authority of the U.S. Secret Service on the grounds that private companies also hire body guards to protect their presidents and chief executive officers.

In reality, the grant of Federal police powers to the SI's police is very broad. Under 40 U.S.C. § 193x, the SI police are authorized to enforce all laws and regulations applicable to the U.S. National Capital Parks, concurrently with the U.S. Park Police. Also, the Smithsonian has concurrent authority with the U.S. Secret Service, the U.S. Park Police, the Federal Bureau of Investigation, the Executive Protection Service, other Federal agents, and the Metropolitan Police Department to enforce local criminal laws in the District of Columbia. *See Graves v. District of Columbia*, 287 A.2d 524, 529 & n.8 (D.C.

1972)(Nebeker, J., dissenting)(listing the Smithsonian Institution's Police among law enforcement "agencies" created by Congress that enforce the law locally within the District of Columbia). Certainly, if the SI police undertook an improper search against a patron, that patron could state a cause of action against the SI for a constitutional violation by Federal police officers acting under the color of Federal authority. *See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This Court should not permit any lower court to dismiss a congressional delegation of Federal law enforcement power; yet, that is what the Court of Appeals has done here.

Additionally, the Smithsonian performs an independent governmental function in issuing regulations that prohibit discrimination against, or the segregation of, persons on its property because of race, religion, color, or national origin. In that regard, the Smithsonian's promulgated and published regulations state the following:

> There shall be no discrimination by segregation or otherwise against any person or persons because of race, religion, color, or national origin in furnishing or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided thereby on the premises.

36 C.F.R. § 520.16. Certainly, such a regulation prohibiting discrimination constitutes the independent performance of a substantial and unique governmental authority. Again, while private entities may also prohibit discrimination in their

establishments, the violation of the SI's nondiscrimination regulations, in-and-of-themselves, are subject to prosecution as a violation of Federal law. 40 U.S.C. §§ 193s and 193t.

In addition to the regulatory powers discussed above, the SI meets the definition of an agency because of other examples of the substantial authority it has in the exercise of specific functions. *Soucie*, 448 F.2d at 1073. While the SI is subject to substantial Federal control over its day-to-day operations and financial affairs, the Congress has also vested in the SI vast independent authority in determining how to perform those operations. *See* 20 U.S.C. §§ 59-81. For example, Congress has authorized the SI to enter into contracts and to buy and sell works of art of its choosing. For all of these reasons, the SI possesses substantial and independent governmental authority in the exercise of its specific functions.

C. The Smithsonian Performs Specific Governmental Functions And Possesses Government Information Of Interest To The Public.

Finally, it cannot be denied that the specific activities of the SI serve a governmental function in preserving the nation's artifacts. Similar duties are performed by FOIA and Privacy Act agencies such as the National Park Service, the Department of Agriculture's Forest Service, and the General Service Administration's National Archives. When Congress expanded the definition of agency in the 1974 amendments to the FOIA, it did so to ensure that entities "which perform governmental functions and control information of interest to the public" were encompassed within the Act. H.R. REP. No. 876, Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N.

6267, 6274. Specifically, the 1974 amendment to FOIA states the following:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title *includes* any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f)(emphasis added). Although the SI's fit into the definition of "agency" predates the 1974 amendments, as it is an authority of the Government of the United States under the APA, the 1974 FOIA amendments reflect the congressional purpose behind FOIA which also applies to the SI. Specifically, the SI is the quintessential entity "which performs governmental functions and controls information of interest to the public." H.R. REP. No. 876, Cong., 2d Sess. 8, *reprinted in* 1974 U.S.C.C.A.N. at 6274. As U.S. District Judge Kessler aptly stated in this case, "[w]hen the Court examines the Congressional purposes of the Privacy Act and the FOIA, along with the myriad connections between the Smithsonian and the Federal government, it simply blinks reality to conclude that the Smithsonian is not a Federal agency." *Dong I*, 878 F. Supp. at 250.

It is important for this Court to resolve the issue presented herein because the D.C. Circuit's decision will likely, if left undisturbed, remain the controlling law on this question, as an opportunity for a split in the circuits is unlikely to arise.

Although the SI has facilities outside of the jurisdiction of the D.C. Circuit, clearly the SI is preeminently located in the District of Columbia. Moreover, the FOIA and the Privacy Act each have special venue provisions giving the U.S. District Court for the District of Columbia and, hence, the D.C. Circuit, jurisdiction over any alleged violations regardless of where the violations occur. *See* 5 U.S.C. § 552(a)(4)(B); and 5 U.S.C. § 552a(g)(5). Thus, this Court should grant the instant petition.

CONCLUSION

This case presents important issues about whether the Smithsonian Institution is an agency subject to the requirements of the Freedom of Information Act and the Privacy Act. If the opinion below is permitted to stand the public's right to information about the operations of the Smithsonian Institution and access to information about our national heritage, history, and culture held in its possession will be jeopardized. In addition, the Federal civil servants who comprise the majority of the Smithsonian Institution's work force will not be shielded from improper disclosure of personal information by the Privacy Act, like all other Federal civil servants. The granting of the petitioned-for writ will clarify that a Federal entity largely funded and controlled by the Federal Government, and possessing substantial independent authority in the exercise of specific governmental functions, is an "authority of the Government of the United States" subject to FOIA and the Privacy Act. Therefore, the petitioner respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ENTERED OCTOBER 17, 1997

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 5, 1997 Decided October 17, 199

No. 96-5303

MARGARET DONG,
APPELLEE

v.

SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM & SCULPTURE GARDEN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 94cv00628)

Nancy R. Page, Assistant U.S. Attorney, argued the cause for appellant. With her on the brief was *Eric H. Holder, Jr.*, U.S. Attorney at the time the brief was filed, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Joseph Kaplan argued the cause for appellee. With him on the brief was *John P. Mahoney*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WILLIAMS, GINSBURG and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: Margaret Dong brought this action against her employer, the Smithsonian Institution, for damages under the Privacy Act, 5 U.S.C. § 552a. The district court found the Smithsonian liable and awarded plaintiff $2,500 in compensatory damages. *Dong v. Smithsonian Institution*, 943 F. Supp. 69 (D.D.C. 1996). The Smithsonian appeals from the district court's determination that it is an "agency" subject to the Privacy Act. *Dong v. Smithsonian Institution*, 878 F. Supp. 244 (D.D.C. 1995). Alternatively, it argues that even if it is covered by the Act, its conduct toward plaintiff was not "intentional or willful" as required for imposition of damages under the Act. 5 U.S.C. § 552a(g)(4). We reverse.

* * *

Plaintiff began working at the Hirshhorn Museum and Sculpture Garden in 1985. She currently holds the position of Museum Registration Specialist, which means that her duties include serving as a courier for works of art the Hirshhorn lends to other museums. Museum procedures require employees to obtain permission from the director of the Hirshhorn before acting as a courier. In September 1993, without seeking permission, plaintiff took annual leave and accompanied the painting *Circus Horse* by Joan Miro from Barcelona to the Museum of Modern Art ("MOMA") in New York City. At trial she testified that she deliberately failed to request approval for her trip, even though she had never had such a request denied in the past. Apparently her purpose was to avoid friction with a co-worker, who in her view made trouble when plaintiff was away on courier duty, but not when she simply took annual leave.

Rumors of plaintiff's unauthorized journey soon reached the administrator of the Hirshhorn, Beverly Pierce, and plaintiff's immediate supervisor, Douglas Robinson. Through conversations with the registrar at MOMA and an employee of New York's Metropolitan Museum of Art who had worked

at MOMA at the time of plaintiff's trip, Pierce and Robinson eventually substantiated the story. Both supervisors testified that they telephoned New York (rather than directly confront plaintiff) because they were aware of tensions in the Hirshhorn office where plaintiff worked, and wanted to put the rumors to rest without creating any additional workplace difficulties. When the rumors proved true, Pierce and Robinson approached plaintiff, who admitted taking the trip. She was suspended for five days.

In March 1994 plaintiff instituted this action against the Smithsonian under the Privacy Act, which requires federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual "to the greatest extent practicable." 5 U.S.C. § 552a(e)(2); see *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989). Damages are available under the Privacy Act for "intentional or willful" violations. 5 U.S.C. § 552a(g)(4). The Smithsonian defended on the theory that it is not an "agency" subject to the Act. In the alternative, it contended that its conduct could not be described as intentional or willful given its reasonable belief that the Act did not apply to it. Finally, the Smithsonian argues that even if the Privacy Act applied and even if its understanding to the contrary were not exculpatory, Pierce and Robinson's decision not to obtain information from the plaintiff in the first instance stemmed from a good faith belief that intra-office tensions rendered such a direct confrontation impracticable.

The district court rejected all of the Smithsonian's arguments. It found that the Smithsonian "has sufficient federal ties and control, as well as independent authority, to compel a finding of agency status under the Act." *Dong*, 878 F. Supp. at 248. The district court also held that the Smithsonian had intentionally or willfully violated the Act, saying that the institution was put on notice of its subjection to the Privacy Act by a 1992 district court opinion, *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992), which found it to be an agency for the purposes of the Freedom of Information Act

("FOIA"), a statute whose definition of "agency" also governs the Privacy Act.

Because we hold that the district court erred in finding the Smithsonian to be an "agency" under the Privacy Act, we reverse without reaching its "intentional or willful" defenses.

* * *

The Privacy Act requires "[e]ach agency that maintains a system of records" to gather information about a person directly from that person, to the greatest extent practicable. 5 U.S.C. § 552a(e)(2). The other requirements of the Act similarly apply to "agencies." See §§ 552a(b), (c), (d), (f).

Through § 552a(a)(1), the Act borrows the definition of "agency" found in FOIA, 5 U.S.C. § 552(f).[1] That definition in turn reads as follows:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f). Section 552a(a)(1) cross-references 5 U.S.C. § 551(1), the definition of "agency" in the Administrative Procedure Act ("APA"), but does not explicitly incorporate it. Still, as the parties recognize, the Privacy Act encompasses not only all entities covered by § 552(f) but also all those described by § 551(1), which embraces any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." Indeed, the additional language of § 552(f) was added to FOIA in 1974 "to encompass entities that might have eluded the APA's definition in § 551(1)." *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581, 583 (D.C. Cir. 1990).

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[1] Actually, § 552a(a)(1) refers to "agency as defined in section 552(e) of this title," but § 552(e) has since been redesignated § 552(f).

Hence, to be an agency under the Privacy Act, an entity must fit into one of the categories set forth either in § 552(f) or § 551(1). Because we cannot see how the Smithsonian fits into any of them, we hold that it is not an agency for Privacy Act purposes.

Of the categories listed in § 552(f), the only ones that might be thought to cover the Smithsonian are "establishment in the executive branch" and "Government controlled corporation." It is plain that the Smithsonian is not an establishment in the executive branch. To begin with, nine of the seventeen members of its governing Board of Regents are appointed by joint resolution of Congress, 20 U.S.C. § 43, and six of the remaining eight *are* members of Congress, 20 U.S.C. § 42. (The other two are the Vice President and the Chief Justice of the United States, *id.*) Moreover, there is no evidence that the Secretary of the Smithsonian answers to the President, or that the institution administers federal statutes, prosecutes offenses, promulgates rules and regulations (other than with respect to its own buildings and grounds), or engages in any other typically executive activity. Indeed, if the Smithsonian were to wield executive powers, the method by which its Regents are appointed would appear to violate the Constitution's separation of powers principles. See U.S. Const., art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (officeholders appointed by Congress may act only "in an area sufficiently removed from the administration and enforcement of the public law to permit their being performed by persons not 'Officers of the United States' "); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 275–76 (1991).

Nor is the Smithsonian a "Government controlled corporation" within the meaning of the Privacy Act. There is much force to the Smithsonian's argument that the plain terms of the phrase itself simply do not encompass it. In particular, the Smithsonian contends that it is not "government-controlled" in the day-to-day sense required by our cases, see *Rocap v. Indiek*, 539 F.2d 174, 177 (D.C. Cir. 1976), and that it is not a "corporation," but rather a testamentary trust *res*

denominated an "establishment" by Congress in 1846, 20 U.S.C. § 41. We find it unnecessary to address these arguments, however. Section 552(f) first identifies four specific categories—"any executive department, military department, Government corporation, Government controlled corporation"—and then uses a catch-all phrase to encompass similar entities not precisely fitting any of the four specific molds: "or *other* establishment in the executive branch" (emphasis added). Thus Congress evidently viewed the four specified classes as examples of "establishments in the executive branch," so that an entity clearly outside the executive branch would not qualify even if it could otherwise be shoehorned into the concept of a "Government controlled corporation."[2] This is the most logical reading of the statute; for those who collect canons of construction it might be termed an application of "reverse ejusdem generis (where the general term reflects back on the more specific rather than the other way around), [so] that the phrase 'A, B, or any other C' indicates that A is a subset of C." *United States v. Williams–Davis*, 90 F.3d 490, 508–09 (D.C. Cir. 1996).[3] In short, then, because

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[2] A 1993 report of the House Committee on Government Operations takes the same view of the first four entities listed in § 552(f). In a "Citizen's Guide" to FOIA, under the heading "The Scope of the Freedom of Information Act," it says:

> The Federal Freedom of Information Act applies to documents held by agencies in the executive branch of the Federal Government. The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch.

"A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records," H.R. Rep. No. 103–104, at 5 (1993).

[3] Congress's decision to place the so-called independent regulatory agencies *after* the catch-all phrase confirms this interpretation, in view of the uncertain constitutional status of such agencies vis-à-vis the executive branch. Compare *Wiener v. United States*, 357 U.S. 349, 353 (1958) (President may freely remove officials who are "part of the Executive establishment," as opposed to "those whose tasks

the Smithsonian is not an establishment in the executive branch, it cannot fall into any of the conceivably applicable § 552(f) categories.

Plaintiff proposes that we read the word "includes" in § 552(f) as an invitation to extend agency status to entities that do not belong among the types enumerated but have something in common with them. In support of this idea, she points to legislative history indicating that § 552(f) was intended to broaden FOIA's scope so that it would embrace entities "which perform governmental functions and control information of interest to the public." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974). But Congress did not back this observation with any statutory text remotely matching its scope, such as "governmental entity," and accordingly we stick to the text as enacted.

We recognize, of course, that the word "includes" normally does not introduce an exhaustive list but merely sets out examples of some "general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). But behind § 552(f)'s enumeration there appears to be no general principle in sight other than the one set out in § 551(1); indeed, plaintiff points to no alternative general principle. Moreover, as we have just said, § 552(f)'s structure indicates that Congress did perceive a unifying theme in the four specific kinds of entity mentioned before the catch-all clause—a theme (belonging to the executive branch) not manifest in the Smithsonian. Accordingly, we now turn to § 551(1).

Plaintiff asserts that the Smithsonian fits § 551(1)'s core phrase, "authority of the Government of the United States." In support of this proposition she marshals an impressive array of links between the Smithsonian and the federal government. To list the main ones: the Smithsonian operates under a federal charter granted by Congress in 1846;

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require absolute freedom from Executive interference") with *Morrison v. Olson*, 487 U.S. 654, 687–92 (1988) (Congress may place some limits on President's discretion to remove officials exercising executive functions).

most of its employees—some 70% according to plaintiff, Brief for Appellee at 16 n.3—are considered federal civil service employees; its Regents, as mentioned, are federal officials or are selected by federal officials; it receives extensive federal funding and must submit a detailed annual statement of its expenditures to Congress, 20 U.S.C. § 49; it is subject to the audit and reporting requirements of the Government Accounting Office; "[a]ll moneys recovered by or accruing to [the Smithsonian are] paid into the Treasury of the United States, to the credit of the Smithsonian bequest, and separately accounted for," 20 U.S.C. § 53; it enjoys federal immunity from taxes and libel actions; it receives representation (as in this case) from the Department of Justice; and it publishes rules and notices in the Code of Federal Regulations and the Federal Register. See *Dong*, 878 F. Supp. at 248–49; *Cotton v. Adams*, 798 F. Supp. at 24.

We have already held that factors like these justify classifying the Smithsonian as an "independent establishment of the United States" for purposes of the Federal Tort Claims Act. See *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289, 296 (D.C. Cir. 1977) (*en banc*). But the statute in question here uses narrower language; an entity may be deeply entwined with the federal government without being an "authority of the Government of the United States." Ultimately, then, as we said in rejecting a similar claim, plaintiff's litany of links between the Smithsonian and the federal government is "like Homer's catalogue of ships—exhaustive but quite beside the point." *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993).

The term "authority" is not self-defining. At the very least, however, it seems logical that for an entity to *be* an authority of the government it must *exercise* some governmental authority. Scholars of the APA appear to agree. As one commentator put it, an "agency" for APA purposes is

> a part of government which is generally independent in the exercise of [its] functions and which by law has authority to take final and binding action affecting the rights and obligations of individuals, particularly by the

> characteristic procedures of rule-making and adjudication.

James O. Freedman, "Administrative Procedure and the Control of Foreign Direct Investment," 119 U. Pa. L. Rev. 1, 9 (1970) (internal quotations omitted) (cited in *Irwin Memorial Blood Bank v. American National Red Cross*, 640 F.2d 1051, 1053 (9th Cir. 1981)). See also 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 1.2, at 4 (3d ed. 1994) (focusing on whether "the entity has, or lacks, authority to take binding action"); *Washington Research Project, Inc. v. Dep't of Health, Education and Welfare*, 504 F.2d 238, 248 & n.15 (D.C. Cir. 1974) (citing legislative history of APA in support of a requirement of "final and binding action"); *J.H. Miles & Co., Inc. v. Brown*, 910 F. Supp. 1138, 1159 (E.D. Va. 1995) (holding that quasi-government fisheries council "is not an 'authority' of the U.S. Government because it has no 'authority' to do anything").

Our cases have followed the same approach, requiring that an entity exercise substantial independent authority before it can be considered an agency for § 551(1) purposes. It is quite true that, apart from its roots in the language of § 551(1) and its legislative history, our "substantial independent authority" test both originated in a case involving an entity in the Executive Office of the President, *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology), and has most often been applied in the case of such entities, see *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996) (National Security Council); *Meyer*, 981 F.2d at 1291–98 (Task Force on Regulatory Reform); *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1040–43 (D.C. Cir. 1985) (Council of Economic Advisers); *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (Council on Environmental Quality); cf. *Sweetland v. Walters*, 60 F.3d 852 (D.C. Cir. 1995) (Executive Residence of the President, deemed "analogous" to a unit of the Executive Office of the President). In such cases, naturally, much of the focus was on the *independence* aspect of the formula, since obviously the President exercises authority, and those who have his ear

must at a minimum possess some degree of derivative authority. But the requirement of *authority* derives both from the statutory language itself and from legislative history characterizing the requisite type of authority ("final and binding," see H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 19 (1946), cited in *Washington Research Project*, 504 F.2d at 248–49 n.15), and we have applied the requirement in at least two cases not involving presidential power at all. In *Energy Research Foundation* we applied it to the Defense Nuclear Facilities Safety Board, 917 F.2d at 584–85 (finding it covered because of its investigative and evaluative powers), and in *Washington Research Project* we held that "initial research groups," scholars appointed by the National Institute of Mental Health primarily from outside NIMH to conduct peer review of grant applications, were not agencies under the FOIA definition precisely because of their lack of authority even to make government grants, 504 F.2d at 248.

Washington Research Project might be read to imply that the "initial research groups," had they in fact possessed the power to decide how federal grant money was spent, would have been considered agencies for FOIA purposes. But we have already warned against such a reading of that case. "We held [in *Washington Research Project*] that because the organization in question had no authority to make decisions it was not a government agency, but the converse of that proposition may not always be true; that an organization makes decisions does not always mean that it is a government agency." *Public Citizen Health Research Group v. Dep't of Health, Education and Welfare*, 668 F.2d 537, 543 (D.C. Cir. 1981). In addition, in *Washington Research Project* we noted that the body that *was* empowered to determine the allocation of the grants in question, the National Advisory Mental Health Council ("NAMHC"), derived this power directly from a statute which "empower[ed] the Secretary [of Health, Education & Welfare] to make grant awards if (and only if) the NAMHC so recommends." *Id.* at 248. Plaintiff has identified no comparable delegation of authority to the Smithsonian to control the allocation of federal research dollars, and we know of none. To the extent that the Smithsonian devotes

part of its own budget to funding grants and fellowships, it appears to be no different from any private research university which receives federal funds and enjoys some control over their use.

The Smithsonian is a cultural and research institution, established in 1846 pursuant to a trust bequest of James Smithson, and dedicated to "the increase and diffusion of knowledge among men." 20 U.S.C. § 41. It does not make binding rules of general application or determine rights and duties through adjudication. It issues no orders and performs no regulatory functions. Plaintiff's efforts to demonstrate that the Smithsonian exercises authority focus mainly on Congress's delegation to the institution of limited police powers, including arrest powers, on its own grounds. See 40 U.S.C. §§ 193n, 193v, 193t. She also notes that Congress has authorized the Smithsonian to promulgate regulations in support of its power to maintain safety and order on its premises. 40 U.S.C. § 193r; see 36 CFR §§ 504–20. Yet these limited powers, which enable the Smithsonian to protect its own collections and facilities, fall far short of converting the Smithsonian into "an authority of the Government of the United States." As we said recently, "the Smithsonian's ability to hire its own police force carries little probative weight in that many private museums employ their own security personnel." *Cotton v. Heyman*, 63 F.3d 1115, 1122 (D.C. Cir. 1995).

Our cases, as noted, speak of "*substantial* independent authority." They do not support the proposition that the exercise of *any* independent authority, however confined, converts an entity into an "authority of the Government of the United States." For example, we affirmed a district court decision that the National Academy of Sciences ("NAS") was not an "agency" under § 551(1) despite the fact that it possessed the apparent authority—greater than any possessed by the Smithsonian—to veto the Environmental Protection Agency's suspension of auto emission standards. *Lombardo v. Handler*, 397 F. Supp. 792, 794 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976). Like the NAS, the Smithsonian simply is not the kind of "center of gravity in the

exercise of administrative power" to which § 551(1) refers. *Lombardo*, 397 F. Supp. at 796 (citing Freedman, 119 U. Pa. L. Rev. at 9).

In the most literal sense, of course, the Smithsonian's broad, Congressionally-granted latitude over spending its federally allocated funds and over its own personnel and collections indicates that it possesses "authority in law to make decisions." *Cotton v. Heyman*, 63 F.3d at 1122 (citing *Washington Research Project*, 504 F.2d at 248). But every private organization possesses the power to order its own affairs and carry out transactions with others within the limits set by law. To the extent the Smithsonian exercises anything approaching public authority, that authority appears to be entirely ancillary to its cultural and educational mission.[4] Authority must be governmental in nature to count for § 551(1) purposes.

Finally, plaintiff points out that the Smithsonian is treated as an agency under other federal statutes. Indeed, in acknowledging plaintiff's extensive enumeration of governmental ties we cited the finding of *Expeditions Unlimited*, 556 F.2d at 296, that the Federal Tort Claims Act embraced the Smithsonian, but pointed out that the FTCA defined "Federal agency" broadly to include "independent establishments of the United States." 28 U.S.C. § 2671. Unsurprisingly, the Smithsonian is subject to other statutes whose language also differs from that of the Privacy Act. Thus, Smithsonian employees are covered by the Federal Employment Compensation Act, which applies to employees of "instrumentalit[ies] wholly owned by the United States," 5 U.S.C. § 8101(1)(A), which the Smithsonian concedes it is, at least insofar as the United States, as trustee, holds legal title to the original Smithson trust property and later accretions. Similarly, it is subject to the Inspector General Act ("IGA") not by virtue of

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[4] In addition to the "on-campus" police powers mentioned above, Congress has delegated to the Smithsonian control over certain cultural and research facilities such as the National Zoo, see 20 U.S.C. § 81, and the Canal Zone Biological Area, a 4000-acre tropical forest on Barro Colorado Island, see 20 U.S.C. § 79b.

any agency status, but because Congress has declared it a "designated Federal entity" for IGA purposes, 5 U.S.C. App. 3, § 8G(a)(2). The Smithsonian's status under these other statutes is therefore inapposite.

In sum, the Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive department status necessary under § 552(f).

The judgment of the district court is therefore

Reversed.

APPENDIX B -- MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ENTERED FEBRUARY 28, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET DONG,	)
Plaintiff,	)
v.	) **Civil Action No. 94-628 (GK)**
SMITHSONIAN INSTITUTION,	) **(Motion no. 6-1)**
Defendant.	) **Filed: Feb 28, 1995**

MEMORANDUM-OPINION

I. Introduction and Procedural History

Plaintiff Margaret Dong brings this action under the Privacy Act, 5 U.S.C. § 552a, against her employer, the Smithsonian Institution for damages due to Defendant's alleged

breach of its statutory obligations regarding the collection of employment information under 5 U.S.C. Section 552a(e)(2).[1]

Plaintiff filed her Complaint on March 16, 1994. On May 20, 1994, Defendant filed the instant Motion to Dismiss, to which Plaintiff responded on June 13, 1994, and Defendant replied on June 13, 1994. Upon consideration of the Motion, Plaintiff's Opposition, Defendant's Reply, Defendant's "Further Memorandum," Plaintiff's Response to the Defendant's Further Memorandum, oral arguments by counsel at the September 13, 1994 Status Conference, the applicable statutory and case law, and the file in this case in its entirety, the Court concludes that Defendant's Motion to Dismiss shall be **denied** for the reasons stated below.

II. Statement of Facts[2]

Plaintiff Margaret Dong is employed as a Museum Registration Specialist by the Hirshhorn Museum and Sculpture Garden, in Washington, D.C., which is a museum within the Defendant Smithsonian Institution. In her Complaint, Plaintiff alleges that two of her supervisors at the

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[1] This Section requires each agency to "collect information to the greatest extent practicable from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal Programs." 5 U.S.C. § 552a(e)(2).

[2] For purposes of considering the merits of Def endant's Motion made pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure, the Court deems all allegations in the Complaint to be true.

Hirshhorn engaged in an investigation in violation of the Privacy Act by failing to first discuss charges of alleged misconduct with her before commencing the investigation and disclosing the nature of the charges against her inside and outside of the Smithsonian. Plaintiff claims damages for, inter alia, the emotional trauma she suffered as a result of Defendant's actions, and the harm to her professional reputation that ensued.

The sole issue raised by Defendant's Motion to Dismiss is whether the Smithsonian is an "agency" under the Privacy Act, 5 U.S.C. § 552a, and thus subject to the requirements of the Act. If the Smithsonian does not constitute an agency under the Privacy Act, then this action is properly dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6).

The Court acknowledges that the answer to this challenging question of statutory construction is not entirely clear. However, for or all the reasons set out below, the Court concludes that the Smithsonian is covered by the Act, and that Defendant's Motion must, therefore, be denied.

A. The Relevant Statutory Language

The Privacy Act sets out certain requirements for "[e]ach agency that maintains a system of records" and provides for civil remedies against "any agency" in certain circumstances. 5 U.S.C. § 552a(e), (g)(1). According to the Act,, "the term 'agency' means agency as defined in section 552(e) of this title," which is part of the Freedom of Information Act (FOIA). 5 U.S.C. § 552a(a)(1).

Under recent amendments to FOIA, the definition of agency is now contained in FOIA section 552(f) rather than the section referenced in the Privacy Act, 552(e). Section 552(f), in turn, refers to the definition of "agency" in the Administrative Procedure Act, 5 U.S.C. § 551(l), and provides:

> For purposes of this section, the term "agency" as defined in section 551(l) of this title includes any executive department,, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f) (emphasis added).

The definition of agency in the Administrative Procedure Act provides that "'agency' means each authority of the government of United States, whether or not it is subject to review by another agency." 5 U.S.C. § 551(l). The statute sets out the following exceptions to this general definition of agency: the Congress; the Courts of the United States; the governments of territories or possessions of the United States; the government of the District of Columbia; agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; courts of martial and military commissions; military authority exercised in the field in time of war or in occupied territory; or functions conferred by certain sections of Title 5 which do not apply here. 5 U.S. C. §§ 551(l) (A) - 551(l)(H).

Thus, the language of the Act provides that, to be covered by the Privacy Act, the Smithsonian merely has to qualify as an "authority of the United States, whether or not it is subject to review by another agency." The term "authority" is not defined. However, we start our analysis by noting that the definition of agency is an inclusive one. The fact that Congress used the term "includes" in Section 552(f) strongly suggests that the definition does not apply only to the entities listed--that is, executive departments, military departments, Government corporations, Government controlled corporations, other establishments in the executive branch of the government, and independent regulatory agencies. Otherwise, had Congress intended to limit the definition to the above-named entities, it could have done so easily by including a limiting word or phrase such as "only" or "limited to". In short, Congress's choice of the term "includes" leads to the conclusion that Congress meant to keep the definition broad enough to cover not only these entities listed, but other national entities as well.

On the other hand, Congress chose to specifically exclude eight different governmental entities from its definition of "agency" in Section 551(1). Significantly, the Smithsonian is not one of the eight entities specifically excluded from coverage of the Act. Therefore, as long as it is not excluded from the Act by virtue of the eight categories listed in Section 551(1), and given the inclusiveness of Section 552(f) as well as the failure of Congress to provide any limiting definition of the term "authority", the Court concludes that the Smithsonian does not have to be an "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of

the government . . . or any independent regulatory agency" to qualify as "an authority of the Government of the United States" and thus constitute an agency under the Privacy Act. 5 U.S.C. § 551(1).

Given the imprecision of the statute itself, the Court will also look to the Act's legislative history and to the relevant case law for further guidance.

B. Legislative History of the Act

The legislative history of the Freedom of Information Act is also less than clear and conclusive on whether the Smithsonian constitutes a FOIA agency. The legislative history that is available, however, does indicate an intent to establish a broad definition encompassing entities which, while not technically a part of the federal government itself, are characterized by substantial governmental involvement and control.

For example, Congress amended FOIA in 1974 in order to broaden the definition of "agency" to encompass more entities "which perform governmental functions and control information of interest to the public." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), reprinted in U.S. Code Cong. & Admin. News 1974, 6267, 6274 (hereinafter "House Report"); quoted in Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (Wald, J., dissenting); see also H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess., September 25, 1974, reprinted in FOIA Source Book: Legislative History, Texts, and Other Documents, Committee on Government 0perations, U.S. House of Representatives 219, 231 (hereinafter "Conference

Report") (stating that the conference substitute follows the House bill).

According to the House Report, the definition of "agency" under FOIA (and the Privacy Act) is broader than its definition under the APA. Id. Although the FOIA definition applies to governmental entities as well as government-controlled corporations, it does not apply to "corporations which receive appropriated funds but are neither Chartered by the Federal Government nor controlled by it." Conference Report, supra, at 231-32. This focus on governmental involvement in FOIA's definition of "agency" is designed to further FOIA's purpose to protect "the right of the individual to be able to find out how his [or her] government is operating." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966), 1966 U.S. Code Cong. & Admin. News at 2423.

Both of the excerpts from the legislative history cited above suggest that Congress intended that the determination of agency status under FOIA and the Privacy Act depend largely on the nature and extent of an entity's relationship with the federal government, i.e., the greater the governmental involvement and control, the more likely that the entity would be considered a covered agency. Such an analysis is properly applied in this case.[3]

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[3] The legislative history also indicates that the definition of "agency" does not apply to entities "whose sole function is to advise and assist the President." H.R. Rep. No. 1380, 93rd Cong., 2d sess. 14 (1974), quoted in Meyer, supra, 981 F.2d at 1298. Since neither side contends that the Smithsonian's sole function is to advise and assist the President, this statutory exclusion is not relevant to this case.

C. Precedent

Although courts have ruled on the "agency" status of numerous entities, they have not developed any uniform test for making such a determination. See, generally, Richard P. Shafer, Annotation: The Meaning of the Term "Agency" for Purposes of the Freedom of Information Act, 57 A.L.R. Fed. 295 (1994). Some courts, however, have enunciated that two factors are relevant to the determination of agency status: (1) whether the entity has "independent decisional authority", and (2) whether the entity is subject to "day-to-day federal control". Public Citizen Health Research Group v. Department of Health, Education and Welfare, 668 F.2d 537, 541 (D.C. Cir. 1981), citing Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

In some cases, the Court of Appeals for the D.C. Circuit has focused primarily on the first of the two factors above, and engaged in a "functional analysis". For example, in Soucie v. David, the court conceded that the APA's statutory definition of "agency" is not "entirely clear," but concluded that the APA "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F. 2d 1067, 1073 (D.C. Cir. 1971) ; see also Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993).

In a different case more factually similar to this one, the D.C. Circuit emphasized the second of the two factors, and consequently found the Federal Home Loan Mortgage Corporation ("the Corporation"), to be an "agency" subject to the Privacy Act. Rocap v. Indiek, 539 F.2d 175, 176-77 (D.C. Cir. 1976). In holding that FOIA's definition of agency

applied to "hybrid governmental/private entities" the Rocap Court found it compelling that, not only did the corporation have a Federal Charter, but also was subject to "substantial federal control over its day-to-day operations." Id. at 177. In the situation of a hybrid governmental/private entity, the court concluded, the proper inquiry to be made in determining if an entity constitutes an agency under FOIA and the Privacy Act is the amount of federal control.[4] In making this determination, the Rocap Court engaged in the following analysis:

> The organizational structure of the Corporation exhibits many characteristics similar to those of other governmental entities subject to the Freedom of Information Act. It is federally chartered, its Board of Directors is Presidentially appointed, it is subject to close governmental supervision and control over its business transactions, and to federal control over its business transactions, and to federal audit and reporting requirements. In addition, the Corporation is expressly designated as an "agency," and its employees are officers and employees of the United States, for a number of purposes. Like other agencies, it is empowered "to make and enforce such bylaws, rules, and regulations as may be necessary or appropriate to carry out the purposes of [its enabling act.]" (citation omitted).

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[4] See Transcript of Motions Hearing Before the Honorable Charles R. Richey, United States District Judge, District of Columbia, Cotton v. Adams, CA. No. 91-2827 (CRR)(March 18, 1992)(filed April 2, 1992)(engaging in such an inquiry).

Rocap v. Indiek, 539 F.2d at 176.

Under Rocap and its progeny, it is unnecessary to determine whether the Smithsonian is a government controlled corporation, a government corporation, or some other kind of establishment in the executive branch of the government because "regardless of its label," it is the "threshold showing of substantial federal control or supervision" that "is required before an entity can be characterized as 'federal'". Irwin Memorial v. American National Red Cross, 640 F.2d 1051, 1054-55 (9th Cir. 1981).

Applying these standards on a case-by-case basis, the Court of Appeals for our Circuit has concluded that FOIA's definition of "agency" applies to a broad range of entities. For example, the court concluded that the Office of Science and Technology,[5] the Defense Nuclear Facilities Safety Board,[6] the Council on Environmental Quality,[7] the Office of Personnel Management,[8] and even the Federal Home Loan Mortgage

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5 Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

6 Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581 (D.C. Cir. 1990).

7 Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C. Cir. 1980).

8 Dickson v. Office of Personnel Management, 828 F.2d 33 (D.C. Cir. 1987).

Corporation[9] all constitute FOIA agencies. Conversely, for reasons that do not apply here, the court determined that the Council of Economic Advisors,[10] the National Capital Medical Foundation, Inc. (serving as a Professional Standards Review Organization),[11] and the Task Force on Regulatory Relief[12] are not FOIA agencies.

Ultimately the Court of Appeals for our Circuit has concluded that, with the "'myriad organizational arrangements for getting the business of the government done'", "'any general definition [of the term agency] can be of only limited

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9 Rocap v. Indiek, 539 F.2d 175, 176-77 (D.C. Cir. 1976).

10 Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (holding that the Council of Economic Advisers' sole function was that of "advising and assisting the President," and consequently the Council was not an agency for purposes of FOIA).

11 Public Citizen Health Research Group v. Department of Health, Education and Welfare, 668 F.2d 537 (D.C. Cir. 1981)(excluding the National Capital Medical Research Group from coverage under the Act on the grounds that, inter alia, it was organized under the laws of the District of Columbia rather than federal law, it was controlled by a Board of Trustees all of which were private individuals, and its employees were not government employees).

12 Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993) (exempting the Task Force because its sole function was to "advise and assist" the President).

utility" and, consequently, "'the unavoidable fact is that each new arrangement must be examined anew and in its own context.'" Public Citizen Health, supra, 668 F.2d at 542 (quoting Washington Research Project, 504 F.2d at 245-46).

Applying the criteria discussed above to the case at bar, the Court concludes that the Smithsonian qualifies as a FOIA agency when "examined anew and in its own context." Id.

D. Federal Agency Characteristics of the Smithsonian

As outlined by the Plaintiff in its Opposition to Defendant's Motion to Dismiss, as well as by the courts in Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992), appeal pending, and Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institution, 566 F.2d 289, 296 (D.C. Cir. 1977), the Smithsonian has sufficient federal ties and control, as well as independent authority, to compel a finding of agency status under the Act. Specifically, the following federal characteristics of the Smithsonian establish it to be an agency within the definition of FOIA and the Privacy Act.

The ties between the Smithsonian and the federal government are numerous. For example, the Smithsonian is chartered by an Act of Congress.[13] 20 U.S.C. § 41. It also has a majority of federal civil service employees. Expeditions Unlimited, supra, at 296; Cotton v. Adams, supra at 24. It receives representation from the United States Attorney. Id. It

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13 The Court recognizes, of course, that the Smithsonian was created at a time when all corporations were Congressionally chartered.

enjoys absolute governmental immunity in libel suits. Id. It receives a vast amount of federal funding which it then disburses to its various programs. Id. It is subject to GAO audit and reporting requirements and complies with the GAO's accounting standards. Id. It enjoys federal status in taxes and property transfers. Id. It publishes rules and regulations, such as its police regulations, in the CFR and the Federal Register. Id.; see also Cotton v. Adams, March 18, 1992 Hearing, supra.

Further, the Board of Directors are either themselves federal officials or else are selected by federal officials. The President of the Senate selects the three members who are Senators; the Speaker of the House selects the three members who are Representatives; and Congress selects the other nine members of the Board of Directors by joint resolution. 20 U.S.C. §§ 43 (Regents of the Smithsonian). Similarly, federal officials appoint or serve themselves as the individuals authorized to direct the business of the Smithsonian member museums. 76cc(b) (Board of Trustees of the Hirshorn Museum); 76h(b) (Board of Trustees of the Center for the Performing Arts); 769(b) (Board of Trustees of the Center for the Performing Arts); 80(b) (nine members of the National Armed Forces Museum Advisory Board).

The financial ties between the Smithsonian and the federal government are also noteworthy. The Secretary of the Smithsonian must "submit to Congress . . . a detailed statement of the expenditures of the preceding fiscal year." 20 U.S.C. § 49. The Treasury Department keeps "[a]ll moneys recovered by or accruing to [the Smithsonian]". 20 U.S.C. § 53. Seventy-five percent of all of the Smithsonian's operating and maintenance costs are derived from federal funds. Expeditions Unlimited, supra, 566 F.2d at 296 n.4. Significantly, on certain

employment forms, the Smithsonian holds itself out to its employees as subject to the Privacy Act. See, e.g., Standard Form 1164, Attached to Plaintiff's Opposition to Defendant's Motion to Dismiss. In all of these ways, the structure of the Smithsonian Institution reveals its status as an authority of the federal government properly subject to FOIA and the Privacy Act.

Additionally, the Smithsonian possesses independent decision making authority. For example, it possesses police powers to enforce regulations concerning its grounds, to designate special police, and to punish violators of the regulations. 40 U.S.C. §§ 193n, 193r, 193s. By having its own rule-making power, as well as authority to enforce those rules by imposing sanctions (e.g. fines) on violators, the Smithsonian has the power to, and in fact does, make binding decisions. Furthermore, the Smithsonian possesses the power to make binding decisions regarding how to spend its substantial budget derived from the large amounts of federal funds appropriated to it by Congress. To assist the Smithsonian in carrying out its mission, Congress authorized the Smithsonian to enter into contracts. See, e.g., 20 U.S.C. §§ 51-53, 54-57, 67.

Congress also granted the Smithsonian's Board of Regents or executive committee of that Board the discretion over the disbursement of Congressional appropriations. 20 U.S.C. § 57. For example, Congress appropriated funds for the Hirshhorn Museum and Sculpture Garden to be spent "as may be necessary for the maintenance and operation of such museum and sculpture garden." 20 U.S.C. § 76ee. Similar provisions demonstrating the Smithsonian's discretion regarding appropriations can be found in the subchapters

defining the National Portrait Gallery (20 U.S.C. § 75g); JFK Center for the Performing Arts (20 U.S.C. § 76n(c)); Smithsonian Gallery of Art (20 U.S.C. § 76g); Canal Zone Biological Area (20 U.S.C. § 79b(d)); National Armed Forces Museum Advisory Board (20 U.S.C. § 80d), and most of the other museums and centers within the Smithsonian institution.

Furthermore, each individual museum's directors possess the authority to buy and sell appropriate art work or historical materials. For example, Congress granted the Board of Trustees of the Hirshhorn Museum "sole authority (i) to purchase works of art for the Joseph H. Hirshhorn Museum and Sculpture Garden, [and] (ii) to loan, exchange, sell or otherwise dispose of said works of art". 20 U.S.C. § 76cc. The Smithsonian also has authority, pursuant to Title 5 of the United States Code, to make decisions, with regard to its employees--for example, to make binding decisions with regard to hiring, discipline, promotions, details, reassignments and performance appraisals. 5 U.S.C. ch. 75. In these ways, as well as others, the Smithsonian possesses the independent authority to evaluate and coordinate, as well as implement, its own programs.

Significantly, courts have found the Smithsonian to be an agency for numerous other purposes.[14] For example, the U.S. Court of Appeals for the D.C. Circuit, en banc, upheld a panel decision holding that the Smithsonian was a federal

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[14] The Court recognizes that the definition of "agency" differs somewhat among statutes. Nevertheless, a finding of agency status in other contexts still constitutes information helpful to the Court in determining agency status under the FOIA.

agency under the Federal Tort Claims Act and thereby was entitled to absolute governmental immunity from a suit for libel. Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978). See also Magruder v. Smithsonian Institution, 758 F.2d 591, 593 (11th Cir. 1985) (treating the Smithsonian institution as the United States in holding that the Plaintiff's tort claim was time-barred).

The Smithsonian was also found to be an executive agency pursuant to Section 105 of Title 5, and therefore immune from suit under the exemptions which were then applicable to executive agencies under the Age Discrimination in Employment Act. Benima v. Smithsonian Institution, 471 F. Supp. 62 (D. Mass. 1979). Additionally, the EEOC has determined that the Smithsonian--including both its federally funded and privately funded parts--was an executive branch agency, like the Postal Service and Postal Rate Commission, within the meaning of Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. Decision No. 89-3, FEP Cases 1889, 1896 (June 27, 1989). For Title VII purposes, the Smithsonian has enjoyed a 30-day statute of limitations for equal opportunity complaints against federal employers as opposed to the 90-day statute of limitations for complaints against private employers. 42 U.S.C. §§ 2000e-16(c), 2000e-5(f)(1).

Perhaps most importantly, the Smithsonian "performs governmental functions as a center of scholarship and a national museum responsible for the safekeeping and maintenance of national treasures." Cotton v. Adams, supra, at 24. Clearly, the Smithsonian, as the country's national

museum, "control[s] information of interest to the public." House Report, supra, at 6274.

While none of these facts about the operation and legal status of the Smithsonian would, by themselves, endow it with agency status, they do, taken together, lead to the conclusion that the Smithsonian enjoys sufficient federal involvement and independent decisionmaking authority to merit agency status under FOIA when examined "in its own context.'" Public Citizen Health, supra, 668 F.2d at 542 (quoting Washington Research Proiect, 504 F.2d at 245-46). When the Court examines the Congressional purposes of the Privacy Act and the FOIA, along with the myriad connections between the Smithsonian and the federal government, it simply blinks reality to conclude that the Smithsonian is not a federal agency.

III. Conclusion

For all of th e reasons stated above, this Court finds that Defendant the Smithsonian Institution constitutes an agency subject to the Privacy Act, 5 U.S.C. § 552a. Accordingly, this Court has subject matter jurisdiction over this action, and Defendant's Motion to Dismiss must be **denied**.

An order consistent with this Opinion follows.

/s/

2/28/95
Date

GLADYS KESSLER
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET DONG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 94-628 (GK)**
	)	
THE SMITHSONIAN INSTITUTION,	)	**(Motion no. 6-1)**
	)	
Defendant.	)	
	)	

ORDER

This matter comes before the Court upon Defendant's Motion to Dismiss. Upon consideration of the Motion, Plaintiff's Opposition, Defendant's Reply, Defendant's "Further Memorandum," Plaintiff's Response to the Defendant's Further Memorandum, oral arguments by counsel at the September 13, 1994 Status Conference, the applicable statutory and case law, and the file in this case in its entirety, the Court concludes that Defendant's Motion to Dismiss shall be **denied** for the reasons stated in the accompanying Memorandum-Opinion.

WHEREFORE, it is this *28th* day of February, 1995, hereby

ORDERED, that Defendant's Motion to Dismiss (6-1) is **denied**.

/s/

2/28/95
Date

GLADYS KESSLER
U.S. District Judge

APPENDIX C -- THE ORDERS ON REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ENTERED DECEMBER 3, 1997

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5303 **September Term, 1997**

94cv00628

Margaret Dong,

Appellee,

v.

The Smithsonian Institution, Hirshhorn Museum & Sculpture Garden,

Appellant

Before: Williams, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed November 17, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5303 **September Term, 1997**

94cv00628

Margaret Dong,

Appellee,

v.

The Smithsonian Institution, Hirshhorn Museum & Sculpture Garden,

Appellant

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Wald, joined by Circuit Judge Tatel, concurring in the denial of rehearing in banc is attached.

Statement Of WALD, *Circuit Judge,* joined by TATEL, *Circuit Judge,* concurring in the denial of rehearing *in banc:*

Although I have considerable doubts about the panel's conclusion that the Smithsonian Institution is not an "authority of the Government of the United States," I do not think an *in banc* hearing would render any different result. I hope that the Supreme Court (or the Congress) will take a hard look at the issue.

APPENDIX D -- THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT SOUGHT TO BE REVIEWED. ENTERED OCTOBER 17, 1997, MANDATE ENTERED DECEMBER 18, 1997

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5303

Margaret Dong,

Appellee,

v.

The Smithsonian Institution, Hirshhorn Museum & Sculpture Garden,

Appellant

Appeal from the United States District Court for the District of Columbia (No. 94cv00628)

Before: WILLIAMS, GINSBURG and HENDERSON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Robert A. Bonner
Deputy Clerk

Date: October 17, 1997

Opinion for the Court filed by Circuit Judge Williams.

(2)

Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

No. 97-1435

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET DONG, PETITIONER

v.

SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM AND SCULPTURE GARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Smithsonian Institution is "an authority of the Government of the United States," 5 U.S.C. 551(1), and is thus an "agency" subject to the provisions of the Privacy Act, 5 U.S.C. 552a.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1435

MARGARET DONG, PETITIONER

v.

SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM AND SCULPTURE GARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 125 F.3d 877. The opinion of the district court (Pet. App. 14a-30a) is reported at 878 F. Supp. 244.

JURISDICTION

The court of appeals entered its judgment on October 17, 1997. Pet. App. 37a-38a. A petition for rehearing was denied by the court of appeals on December 3, 1997. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on March 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act delineates a number of data collection, processing, and disclosure requirements for "[e]ach agency that maintains a system of records" about individuals. 5 U.S.C. 552a(a)(5), 552a(e); see generally *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 766-767 (1989). One requirement is that such agencies

> collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

5 U.S.C. 552a(e)(2).

The Privacy Act identifies the "agenc[ies]" subject to its provisions by incorporating the definition of "agency" contained in the Freedom of Information Act (FOIA). 5 U.S.C. 552a(a)(1), 552(f).[1] FOIA, in turn, defines a covered "agency" in the following terms:

> [T]he term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. 552(f)(1). Section 551(1), which is part of the Administrative Procedure Act (APA), further

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[1] The Privacy Act actually refers to "agency as defined in section 552(e) of this title." 5 U.S.C. 552a(a)(1). Section 552(e), however, was subsequently redesignated Section 552(f).

provides that "agency" means "each authority of the Government of the United States."

The Privacy Act renders the United States liable for civil damages if an agency intentionally or willfully violates the Act's terms. 5 U.S.C. 552a(g)(4).

2. Petitioner has been employed by the Smithsonian Institution's Hirshhorn Museum and Sculpture Garden (Smithsonian) since 1985. Pet. App. 2a. As part of her job, she serves as a courier for works of art that the Smithsonian lends to other museums. *Ibid.* The Smithsonian requires that employees like petitioner receive permission before acting as a courier.

In September 1993, petitioner "deliberately failed to request approval" before serving as a courier for a painting that was being shipped to the Museum of Modern Art in New York City. Pet. App. 2a. Petitioner claimed that she did not seek advance authorization because she wished "to avoid friction with a co-worker, who in her view made trouble when [petitioner] was away on courier duty." *Ibid.*

When word of petitioner's unauthorized trip reached her superiors, they sought confirmation from the registrar and another employee at the Museum of Modern Art. Pet. App. 2a-3a. Petitioner's supervisors explained that they sought to substantiate the rumors of petitioner's violation in this manner "because they were aware of tensions in the Hirshhorn office where [petitioner] worked, and wanted to put the rumors to rest without creating any additional workplace difficulties." *Id.* at 3a. Once confronted with the information, petitioner admitted taking the trip and received a five-day suspension. *Ibid.*

3. In March 1994, petitioner filed suit against the Smithsonian, claiming that the failure to seek confirmation of the trip directly from her violated the Privacy Act, 5 U.S.C. 552a(e)(2). The Smithsonian defended, in part, on the ground that it is not an "agency" subject to the Privacy Act. Pet. App. 3a. The district court ruled that the Smithsonian is a covered agency under the Privacy Act. *Id.* 3a, 16a-30a.[2]

4. The court of appeals reversed. Pet. App. 1a-13a. The court ruled that the Smithsonian is not an "authority of the Government of the United States" under 5 U.S.C. 551(1), as incorporated into 5 U.S.C. 552(f). The court of appeals explained that, although the Smithsonian has some connections to the federal government, the definition of agency under the Privacy Act (as incorporated from the APA) requires an exercise of "substantial independent" governmental authority. Pet. App. 8a, 9a. "[A]n entity may be deeply entwined with the federal government without being an 'authority of the Government of the United States.'" *Id.* at 8a. The court noted that the exercise of governmental authority under the Privacy Act and the APA is ordinarily characterized by the power to take final and binding action affecting the rights and obligations of individuals, and typically occurs through the procedures of rulemaking and

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[2] The Smithsonian also contended that, given its reasonable belief that it was not subject to the Privacy Act, damages were unavailable because the supervisors' actions were neither intentional nor willful. Additionally, the Smithsonian argued that the intra-office tension justified the initial failure to confront petitioner directly. Pet. App. 3a. The court of appeals did not address either of those issues, and petitioner does not raise them in her certiorari petition.

adjudication. *Id.* at 7a-13a. The Smithsonian, however, "does not make binding rules of general application or determine rights and duties through adjudication." *Id.* at 11a. Nor, the court of appeals continued, does the Smithsonian issue orders or perform any regulatory functions. *Ibid.* The court concluded that, "[t]o the extent the Smithsonian exercises anything approaching public authority, that authority appears to be entirely ancillary to its cultural and educational mission." *Id.* at 12a (footnote omitted).[3]

ARGUMENT

The court of appeals held in this case, as it had ruled in previous cases, that an entity must exercise "substantial independent authority" before it will qualify as an "authority of the Government of the United States" within the meaning of 5 U.S.C. 551(1). Pet. App. 9a.[4] Petitioner does not dispute that the

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[3] The court of appeals also concluded that the Smithsonian is not an "establishment in the executive branch," within the meaning of 5 U.S.C. 552(f), because (i) its Board of Regents is composed principally of persons drawn from outside the Executive Branch, (ii) it is not answerable to the President, and (iii) it does not engage in typical Executive Branch activities. Pet. App. 5a. The court of appeals likewise determined that the Smithsonian does not qualify as a "Government controlled corporation" under Section 552(f), because that definition applies only where the corporation is also an "establishment in the executive branch." Pet. App. 5a-7a. Petitioner does not challenge either of those aspects of the court of appeals' ruling. See Pet. 14 n.4.

[4] See also *Armstrong* v. *Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Meyer* v. *Bush*, 981 F.2d 1288, 1292-1293 (D.C. Cir. 1993); *Rushforth* v. *Council of Econ. Advisers*, 762 F.2d 1038, 1042-1043 (D.C. Cir. 1985); *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

court of appeals' "substantial independent authority" test represents the correct legal standard for deciding whether the Smithsonian is an "authority of the Government of the United States." Petitioner disagrees only with the court of appeals' application of that correct legal test to the specific facts of this case. See Pet. 16-17, 23-28 (arguing that the Smithsonian does exercise substantial and independent governmental authority). That disagreement presents no issue of broad importance that warrants an exercise of this Court's certiorari jurisdiction. Because the court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals, the petition for a writ of certiorari should be denied.

1. The decision of the court of appeals does not conflict with the ruling of any other court of appeals. To the contrary, the court's ruling is the first appellate decision to address whether the Privacy Act applies to the Smithsonian.

While petitioner is correct (Pet. 29-30) that the majority of litigation against the Smithsonian is likely to arise within the District of Columbia Circuit, the Smithsonian does operate and have facilities outside the District of Columbia. See, *e.g.*, 20 U.S.C. 78, 79. Litigation involving the Smithsonian thus does arise within other circuits. See, *e.g.*, *Rivera* v. *Heyman*, No. 97-9316 (2d Cir.) (pending) (applicability of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act to the Smithsonian); *Magruder* v. *Smithsonian Inst.*, 758 F.2d 591 (11th Cir. 1985); *Genson* v. *Ripley*, 681 F.2d 1240 (9th Cir.), cert. denied, 459 U.S. 937 (1982); *California* v. *Mead*, 618 F.2d 618 (9th Cir. 1980). The Privacy Act's venue provision, moreover, authorizes suit to be brought not

only in the District of Columbia, but also in the district in which the complainant resides or has its principal place of business, or in which the agency's records are located. 5 U.S.C. 552a(g)(5); see also 5 U.S.C. 552(a)(4)(B). The lack of a circuit conflict thus remains a relevant consideration in determining whether an exercise of this Court's certiorari jurisdiction is warranted.

2. Petitioner also fails to identify any conflict between the court of appeals' ruling and this Court's decisions. In fact, the court of appeals' requirement that the Smithsonian exercise substantial independent governmental authority is consonant with this Court's precedents. See *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (records produced by an individual who serves only as an assistant to the President are not "agency records" under FOIA); *Forsham* v. *Harris*, 445 U.S. 169, 178-182 (1980) (federal funding and supervision alone are insufficient to create an "agency" subject to FOIA); cf. *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 13-16 (1974) (because Congress denominated the Board an "agency," and the Board determines the rights of contractors through negotiations and the issuance of orders, the Board constitutes an "agency" within the meaning of FOIA).

3. Petitioner asserts (Pet. 25) that this Court's review is necessary because the court of appeals has "muddled" the definition of "agency" under the Privacy Act. That argument is mistaken. The court of appeals' decision is both correct and consistent with precedent. Indeed, the court of appeals' ruling in this case was foreshadowed by *Cotton* v. *Heyman*, 63 F.3d 1115 (D.C. Cir. 1995), in which the D.C. Circuit held that the Smithsonian acted reasonably in

assuming that it did not satisfy the FOIA definition of "agency." *Id.* at 1121-1123.

a. Given the "myriad organizational arrangements" Congress has employed in exercising its legislative power, *Cotton*, 63 F.3d at 1121, and the varied definitional language employed by Congress in laws that operate upon such federally created entities,[5] the court of appeals correctly has eschewed "bright line rules" and employed instead "a fact-specific functional approach," *ibid.*, to identifying APA, FOIA, and Privacy Act agencies. See also *Public Citizen Health Research Group* v. *Department of Health, Educ. & Welfare*, 668 F.2d 537, 543 (D.C. Cir. 1981) ("each arrangement must be examined in its own context"). Rather than "muddling" the law, as petitioner alleges, the decision below reflects a case-specific and careful application by the court of appeals of a consistent legal standard.[6]

Since *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971), the D.C. Circuit has consistently required that an entity exercise "substantial independent authority" before it will be deemed an "authority of

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[5] For example, while the court of appeals held that the Smithsonian is not an agency for purposes of the Privacy Act, it had previously ruled that the Smithsonian does fall within the more capacious definition of "Federal agency" contained in the Federal Tort Claims Act, 28 U.S.C. 2671. *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978).

[6] In any event, even if some disharmony did exist between the court of appeals' decisions, intra-circuit tensions rarely warrant an exercise of this Court's certiorari jurisdiction. Intra-circuit uniformity of law can be maintained by the court of appeals itself. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

the Government of the United States." *Id.* at 1073; see also *Armstrong* v. *Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Meyer* v. *Bush*, 981 F.2d 1288, 1292-1293 (D.C. Cir. 1993); *Rushforth* v. *Council of Economic Advisers*, 762 F.2d 1038, 1042-1043 (D.C. Cir. 1980).

In this case, the court of appeals correctly concluded that the Smithsonian does not satisfy that settled standard. Pet. App. 8a-11a.[7] The nature of the governmental authority to which the Administrative Procedure Act refers in Section 551(1) is the exercise of governmental power—that is, the authority to take final and binding action affecting the rights and obligations of individuals. Pet. App. 8a-9a; see also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 19 (1946); *Cotton*, 63 F.3d at 1122-1123 (appropriate inquiry is whether the entity "had any authority in law to make decisions"); *Washington Research Project, Inc.*, v. *Department of Health, Educ. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975). Typically, an authority of the Government of the United States exercises such power through the procedures of rulemaking and adjudication. See J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 Pa. L. Rev. 1, 9 (1970) (cited in *Irwin Memorial Blood Bank* v. *American Nat'l Red Cross*, 640 F.2d 1051, 1053 (9th

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[7] As the court of appeals noted (Pet. App. 9a-12a), many of its earlier cases involved entities in the Executive Office of the President and thus focused on the "independent" prong of the test, while the present case primarily entailed an inquiry into whether the quantity and character of the Smithsonian's contacts with the federal government constitute a "substantial" exercise of governmental authority.

Cir. 1981)); 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 1.2, at 4 (3d ed. 1994); *Washington Research Project, Inc.*, 504 F.2d at 248 n.15.

The Smithsonian, however, "is a cultural and research institution, established in 1846 pursuant to a trust bequest of James Smithson, and dedicated to 'the increase and diffusion of knowledge among men.'" Pet. App. 11a (citing 20 U.S.C. 41). The Smithsonian neither promulgates rules of general application nor determines the rights of persons through adjudication. It issues no orders to the public or to other governmental bodies, nor does the Smithsonian review or evaluate the conduct and operations of others. It performs none of the regulatory functions that form the province of government agencies. Nor does it allocate federal money to private entities by determining the recipients of federal grants. *Id.* 11a-12a. See *Meyer*, 981 F.2d at 1292-1294 (Presidential Task Force on Regulatory Relief is not a FOIA agency because it exercises no delegated regulatory authority over other agencies); *Rushforth*, 762 F.2d at 1043 (Council of Economic Advisers is not a FOIA agency because "[i]t cannot fund projects * * * nor can it issue regulations for procedures" for entities within or outside the Executive Branch).[8]

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[8] Contrast *Energy Research Found.* v. *Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582, 585 (D.C. Cir. 1990) (Board is a FOIA agency in part because it monitors and investigates atomic facilities, reviews and recommends standards governing such entities, and can impose reporting requirements on the Secretary of Energy); *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1262-1263 (D.C. Cir. 1980) (Council on Environmental Quality is a FOIA agency in part because it could issue guidelines and promulgate regula-

Petitioner is correct (Pet. 25-27) that the Smithsonian does have the authority to operate its own police force, 40 U.S.C. 193n-193x, to prohibit discrimination by Smithsonian personnel, 36 C.F.R. 520.16, and to regulate its own facilities, 36 C.F.R. 504 *et seq.* But such limited self-regulation with no discernible external regulatory impact on the public or other governmental bodies does not amount to an exercise of governmental authority of the sort contemplated by 5 U.S.C. 551(1). See *Meyer*, 981 F.2d at 1292. Most private museums hire protective police forces and regulate their own employees, buildings, and grounds. See Pet. App. 11a.

b. As this Court recognized in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), congressional intent controls the status of governmental entities "for purposes of matters that are within Congress' control—for example, whether [an entity] is subject to statutes that impose obligations or confer powers" such as the APA, the Privacy Act, and FOIA. *Id.* at 392. Petitioner can cite no evidence that Congress intended the Smithsonian to be subject to FOIA or the Privacy Act. By contrast, a number of the cases petitioner relies upon (Pet. 20-24) involve bodies for which Congress had evidenced their agency status. See *Energy Research Found.* v. *Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582-583 (D.C. Cir. 1990) (because Congress deemed the Board an "establishment in the executive branch" in the legislation that created it, the court concluded that the Board is an "establishment in the executive branch"

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tions that bind other agencies); *Soucie*, 448 F.2d at 1075 (Office of Science and Technology is a FOIA agency "[b]y virtue of its independent function of evaluating federal programs").

for purposes of FOIA's agency definition); *Rocap* v. *Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976) ("the Corporation is expressly designated as an 'agency' ").[9]

c. Petitioner also urges (Pet. 18-23) that the Smithsonian is an authority of the government of the United States because it is subject to the day-to-day control of the federal government. Petitioner relies (Pet. 18) upon the fact that the Smithsonian's operations are largely financed with government funds and that its use of those funds is subject to some federal auditing requirements. But federal funding, and the audits that necessarily attend such money, do not amount to "extensive, detailed and virtually day-to-day supervision" by the federal government of the Smithsonian's operations. See *Forsham*, 445 U.S. at 180. Otherwise, private entities that rely on federal grants for their operations and that must satisfy the accounting requirements that accompany such grants would also be deemed agencies subject to FOIA and the Privacy Act. In *Forsham*, however, this Court held that federal grantees are not FOIA agencies. *Id.* at 179-181. Nor does congressional control over the salaries of Smithsonian employees or congressional action affecting the facilities and broad mission of the Smithsonian constitute "extensive, detailed, and virtually day-to-day supervision" by the federal government. *Id.* at 180; see also *Cotton*, 63 F.3d at 1122.

4. Finally, contrary to petitioner's argument (Pet. 15-17), this case presents no issue of broad or re-

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[9] Petitioner's extensive reliance (Pet. 20-22) on *Rocap* is further misplaced because *Rocap* construed the "Government controlled corporation" aspect of FOIA's agency definition, which petitioner admits is not at issue in this case. Pet. 14 n.4.

curring importance warranting an exercise of this Court's certiorari jurisdiction. Rather, the court of appeals' decision entailed a "fact-specific functional" inquiry, *Cotton*, 63 F.3d at 1121, into the Smithsonian's operations for purposes of the Privacy Act's particular definition of "agency." Where, as here, the court of appeals applied the correct legal test, the court's evaluation of whether a particular set of facts satisfies the relevant legal standard does not present the type of broad or substantial legal question that generally occupies this Court's certiorari jurisdiction. In an analogous case last term, for example, the Court declined to review the D.C. Circuit's decision holding that the National Security Council is not a FOIA "agency." See *Armstrong* v. *Executive Office of the President*, 117 S. Ct. 1842 (1997). An analysis of the Smithsonian's status, moreover, is unlikely to provide much guidance to courts for the disposition of future cases, because the Smithsonian performs a mission that differs in kind and in operational structure from that performed by any other governmental entity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARET DONG,
Petitioner,
v.
SMITHSONIAN INSTITUTION HIRSHHORN MUSEUM AND SCULPTURE GARDEN,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Smithsonian Institution (SI) is subject to the provisions of the Privacy Act and Freedom of Information Act by virtue of its being an "authority of the United States," when the SI is federally chartered, relies upon the federal government for the majority of its funding, depends upon federal employees to staff the majority of its positions, and is subject to executive branch audit and budgetary requirements to fulfill its statutory obligation to "increase . . . knowledge" by serving as a repository for the study, display, and preservation of national treasures and artifacts?

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 37, written consent of the parties having been obtained and filed with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner, Margaret Dong.

INTEREST OF THE AMICUS CURIAE [1]

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization which represents approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees and represents workers in nearly every major department and agency of the federal government, including the Smithsonian Institution (SI), where petitioner, Margaret Dong, is a bargaining unit employee represented by AFGE Local 2463.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents administrative grievances and complaints, litigates in federal courts, and engages in legislative activity on behalf of the employees it represents. A further part of AFGE's duty as an exclusive bargaining agent is to assure that the employees it represents are accorded all the rights and protections they are entitled to under applicable collective bargaining agreements and pertinent federal laws, rules, and regulations. This obligation includes assuring that petitioner Dong and her fellow SI employees can exercise not only the right to privacy guaranteed them in the Privacy Act under 5 U.S.C. § 552a(e), but also other statutory rights indirectly implicated by the petitioned-from decision, such as rights under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

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[1] In compliance with Sup. Ct. R. 37.6, the *amicus* states that counsel for the American Federation of Government Employees, AFL-CIO prepared this brief in its entirety. No other person or entity contributed to its preparation or made any monetary contribution to the brief's preparation or submission.

The effect of the court of appeals' holding in *Dong v. SI*, 125 F.3d 877 (D.C. Cir. 1997) (*Dong*) is both to deny the statutory right to privacy under the Privacy Act for over 4,000 employees at the SI and to remove the SI from the purview of FOIA, denying employees and the public alike access to the SI's repository of information, because the two laws share the same definition of "agency." *See* 5 U.S.C. § 552a(a)(1) (cross referencing the term agency as defined in 5 U.S.C. § 552(e).[2] Among other concerns, in this case AFGE is concerned with protecting the privacy rights of its members and with assuring its members' access to information regarding the SI and its activities.

As an organization, AFGE is committed to protecting the constitutional and statutory rights of federal employees and to obtaining redress when those rights have been violated. Because the petitioned-from decision vitally affects federal employees' privacy rights and their rights to information collected by the SI, AFGE has a direct and compelling interest in the outcome of this litigation which justifies its intervention as an *amicus curiae*.

SUMMARY OF ARGUMENT

The petition before the Court raises several important issues which merit this Court's attention.[3] First, the petitioned-from decision raises an important issue of statutory construction which has been a source of confusion for the

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[2] 5 U.S.C. § 552a(a)(1) actually references 5 U.S.C. § 552(e), which was redesignated 5 U.S.C. § 552(f) in section 1802(b) of Pub. L. No. 99-570 (1986).

[3] Several circuit judges have indicated their support for this Court's consideration of the matter:

> Although I have considerable doubts about the panel's conclusion that the Smithsonian Institution is not an "authority of the Government of the United States," I do not think an *in banc* hearing would render any different result. I hope that the *Supreme Court* (or the Congress) will take a hard look at the issue.

Dong v. Smithsonian Institution, 125 F.3d 877 (D.C. Cir. 1997), *reh'g denied*, No. 96-5303 (D.C. Cir. Dec. 3, 1997) (Statement of J. Wald; J. Tatel, concurring) (emphasis added).

circuit courts of appeals. Different circuits have disagreed on the proper test for determining the "agency" status of an entity for defining coverage of federal law. This issue has arisen frequently in multiple contexts and will continue to be raised until this Court sets out an authoritative determination of what it means to be an "agency." *See, e.g., Rivera v. Heyman*, No. 96civ4489 1997WL 620837 (S.D.N.Y. Oct. 7, 1997) (defining "agency" under the Rehabilitation Act of 1973, § 501, 29 U.S.C. § 791; the Civil Rights Act of 1964, Title VII, § 717, 42 U.S.C. § 2000e-16; and 5 U.S.C. § 105); *Expeditions Unlimited Aquatic Enterprises v. SI*, 566 F.2d 289 (D.C. Cir. 1977) (defining "agency" in the Federal Tort Claims Act, 28 U.S.C. § 2671); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976) (defining "agency" for the FOIA, 5 U.S.C. § 552). The D.C. Circuit's holding in *Dong* erroneously departs from the test of substantial government control it announced in *Rocap*, which is the test adopted by the Ninth Circuit. The confusion this split has created should be resolved.

The second important issue is the evisceration of SI employees' rights—to privacy and to access information held by the SI—occasioned by the court of appeals' decision. Congress has determined that privacy rights and the ability to access information about the government are essential and primary rights.[4] Therefore, if the D.C. Circuit's holding in *Dong* is not reviewed, the statutory rights of the SI's employees will continue to be seriously and unlawfully impaired.

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[4] *See* the Privacy Act of 1974, Congressional Findings and Statement of Purpose, § 2(a)(4), Pub. L. No. 93-579, 5 U.S.C. § 552 ("The Congress finds that the right to privacy is a personal and fundamental right protected by the Constitution of the United States"), *reprinted in* 1974 U.S.C.C.A.N. 2178. *See also* the letter of the late Representative William L. Dawson creating the Special Subcommittee on Government Information: "An informed public makes the difference between mob rule and democratic government. If pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process. . . ." H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6268.

A third issue of significance is the potentially adverse impact of the petitioned-from decision on the current relationship between the SI and its employees in areas other than privacy and access to information, such as the whole panoply of rights and protections set out in Title V of the United States Code. The D.C. Circuit's holding in *Dong*, rather than settling a controversy, further confuses the status of the SI and its relationship to other government agencies.

ARGUMENT

I. THE DECISION BELOW PRESENTS A SIGNIFICANT ISSUE OF STATUTORY CONSTRUCTION; THE D.C. CIRCUIT COURT OF APPEALS' DRAMATIC DEPARTURE FROM ITS PRECEDENT UNLAWFULLY AND WRONGFULLY INTERPRETS THE DEFINITION OF "AGENCY" IN FOIA AND THE PRIVACY ACT SO AS TO DEPRIVE THE SI'S EMPLOYEES OF THE PROTECTION OF THOSE LAWS.

Since no definitive judicial or legislative definition of "agency" has been promulgated as it relates to the Privacy Act and FOIA, the courts have devised their own tests for deciding whether certain government or quasi-government entities qualify as agencies under these statutes. The absence of a uniform test has produced a multiplicity of tests, which when applied, have produced conflicting results. *See generally*, Richard P. Shafer, Annotation, *The Meaning of the Term "Agency" for Purposes of the Freedom of Information Act*, 57 A.L.R. FED. 295 (1994).

At the most general level, the D.C. Circuit Court of Appeals has now adopted in *Dong* a very rigid, formalist, and narrow definition of "agency," whereas the Ninth Circuit Court of Appeals has employed a more broad and inclusive definition. While these two courts of appeals were previously in rough accord with their respective analytic approaches, the D.C. Circuit's holding in *Dong* charters a new approach and rejects its earlier, more expansive construction of "agency" articulated twenty years

ago in *Rocap*, 539 F.2d at 177 (While no one characteristic suggests agency status under FOIA, multiple factors which indicate "substantial federal control over its day-to-day operations" will be determinative.).

Not only do the two circuits differ in their understanding of what it means to be an agency, but the D.C. Circuit misapprehends the remedial intent of the Privacy Act and FOIA, which mandates a broad and expansive reading of their language. *See United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494 (1994) ("FOIA reflects 'a general philosophy of full agency disclosure . . .'," citing *Dep't. of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976)). The instant case presents the opportunity for this Court to clarify the test for determining what is, and what is not, an agency and to eliminate the judicial confusion regarding this issue.

A. Congress Intended That Coverage Of Both The FOIA And The Privacy Act Be Construed Broadly.

For the original definition of "agency" in FOIA, Congress used the expansive definition found in the Administrative Procedure Act (APA). *See* 5 U.S.C. § 551(1) ("agency" means each *authority of the Government of the United States*, whether or not it is within or subject to review by another agency. . . .") (emphasis added). By using the broad term "authority" and the general term "government," without specifying a particular branch, Congress intended for FOIA to have sweeping applicability.

Further supporting this broad coverage of FOIA are the 1974 amendments to the Act. In 1974, Congress amended FOIA to "include any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any other regulatory agency." 5 U.S.C. § 552(f). The legislative history of the amendments makes clear that although the language used in the amendment may appear to be more specific,

and thus more restrictive, Congress intended for broad FOIA applicability: "[F]or the purposes of this section [FOIA] the definition of "agency" has been expanded to include those entities which may not be considered agencies under § 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public." H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6274.[5] Therefore, any reading of the term "agency" which narrowly circumscribes the definition of "agency" so as to exclude the SI violates the Act's express legislative intent to expand coverage.

Additionally, removing the SI from the scope of FOIA frustrates the specific intent of the statute and contradicts the SI's statutorily defined mission. In this regard, Congress emphasized that entities "which perform governmental functions and control information of interest to the public" should be covered under FOIA. H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. The SI is *the* statutorily designated repository and center of study for the nation's artifacts and heritage. *See* 20 U.S.C. §§ 41, 50, 59, 60, and 77a. As such, it is the quintessential governmental information repository Congress meant to bring within FOIA coverage by the 1974 FOIA amendments, if it were

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[5] In fact, the breadth of the new definition of "agency" greatly troubled the Department of Justice, which testified against any amendment to FOIA during the subcommittee's hearings. Malcolm D. Hawk, then Acting Assistant Attorney General, stated, "We cannot determine from this language whether or not the Act would be extended to include such groups as the American National Red Cross, the Girl Scouts of America, National Academy of Sciences, the Veterans of Foreign Wars, or the Daughters of the American Revolution." Appendix 1—Agency Views, H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6281. If the Department of Justice believed that such non-profit organizations with minimal federal ties as those mentioned in Mr. Hawk's statement might fall within the expanded definition of "agency," surely the SI, with its much more substantial indicia of federal control, does.

not clear that the SI was already covered by the existing statutory definition of "agency."

Moreover, if the SI is exempt from FOIA, it can ignore employees' and citizens' requests for information about how the SI operates, from the research it undertakes to the national treasures it possesses. Such an outcome is clearly contrary to the SI's mission. The SI's statutory establishment "for the increase and diffusion of knowledge," and its later acquired role as the custodian of much of the nation's scientific and cultural heritage, together affirm a mission consistent with the public's open access to information under the SI's control. 20 U.S.C. §§ 41, 50, 59, 60, and 77a.

Just as FOIA should be read inclusively, so should the Privacy Act, which seeks to insure that a maximum number of people would receive the privacy guaranteed them by the Constitution. *See* S. REP. No. 1183, 93rd Cong., 2nd Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6932 ("Privacy, then, is a shorthand term for the restraint on the power of government to investigate individuals."). Integral to the Privacy Act's broad coversage is its definition of "agency," which cross-reference FOIA's definition of agency. *See* 5 U.S.C. § 552a(a)(1). Congress meant for the Privacy Act to share the broad coverage of FOIA. The petitioned-from decision defeats this Congressional intent.

B. In Determining The Agency Status Of An Entity, In *Dong* The D.C. Circuit Has Shifted Inexplicably And Erroneously From The Test Of The Degree Of Federal Control To The Narrow Test Of Executory Function.

In 1976, when the D.C. Circuit had to decide whether the Federal Home Loan Mortgage Corporation (FHLMC) was an agency subject to FOIA, it concluded that the proper inquiry to be made in determining if an entity constitutes an agency under FOIA and the Privacy Act is the amount of "federal control." *Rocap, supra.* In formulating its test, the D.C. Circuit explicitly looked to

Congress' intent in passing FOIA, including the 1974 amendments. 539 F.2d at 177 ("The legislative history . . . reveals that Congress intended to strengthen the Act and expand its coverage to include quasi-governmental entities. . . ."). Applying the standard of "substantial federal control over its day-to-day operations," which was a standard consistent with the expansion of FOIA applicability, the court of appeals looked at both the number and the strength of the links between the federal government and the entity whose status was being determined. *Id.* In reaching its decision, the D.C. Circuit considered whether or not the organization held a federal charter, who appointed its board of directors, who oversaw its financial reporting requirements, and how it received its funding, although none of those factors, by itself, would "be sufficient to trigger" FOIA. *Id.* at 180. Since the FHLMC was federally chartered, had its board appointed by the President, and had its operations controlled by statute, the court of appeals concluded that it had sufficient government ties to qualify as an agency under FOIA. *Id.* at 181.

Departing from twenty years of precedent without explanation, the D.C. Circuit has now adopted a stricter definition of agency which focuses on the *executory functions* of the entity in question to establish, or not, the requisite substantial independent authority. In the case at bar, the court of appeals first looked to the definition of agency found at 5 U.S.C. § 552(f), which encompasses the 1974 amendments to FOIA. The court found it "plain" that the SI was not an executive agency because the Secretary did not answer to the President, administer laws, prosecute offenses, or promulgate rules and regulations, nor "engage in any other typically executive activity." *Dong*, 125 F.3d at 879. The D.C. Circuit thus summarily dismissed both the argument and the factual record below, as found by the district court, demonstrating that the SI is subject to day-to-day federal control and is a governmental entity which performs specific governmental functions and exercises independent decisional authority, such that status as an authority of the government

is warranted. *See Dong v. SI*, 878 F. Supp. 244, 248-249 (D.D.C. 1995) (*Dong I*).

Despite the SI's significant connections to the executive, *Dong*'s new test of agency status under FOIA erroneously limits executive agency status to those institutions which perform broad regulatory, prosecutorial, or adjudicatory functions. The D.C. Circuit recognized that § 552(f) expanded on the original definition found in § 551(1), but then the court proceeded to construe narrowly the term "authority of the government" to require that an entity "exercise substantial independent authority before it can be considered an agency for § 551(1) purposes." *Dong* at 881. Applying this test to the SI, the court of appeals concluded that, since the SI made no generally binding rules nor made determinations of rights and duties through adjudication, it was not an agency. *Id.* at 882.[6]

The new "independent authority" test clearly departs without justification from the court of appeals' holding in *Rocap*. In addition, the decision specifically contradicts the D.C. Circuit's long held view that "administrative entities that perform neither function [rule making or adjudication] are nevertheless agencies, and therefore subject to the public information provisions of the APA, including the Freedom of Information Act." *Soucie v. David*, 448 F.2d 1067, 1073 (1971) (evaluative function of the Office of Science and Technology enough to qualify it as an agency subject to FOIA).

Quite clearly, if the court in *Rocap* had followed the analysis employed in *Dong*, then the FHLMC, which is a hybrid governmental-private entity like the SI, would not have been an agency subject to FOIA because its specialized function of helping families secure mortgages does not meet the D.C. Circuit's formalist definition of either

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[6] Even if the new test were the correct test to apply (which *Amicus* disputes), the D.C. Circuit misapplied its own test. The *Amicus* adopts the argument in this regard set forth in the petition for writ of certiorari, pp. 23-28.

executive power or authority. The contrary is likewise true: if the D.C. Circuit had stayed faithful to *Rocap*, it would have found, like the district court, that the SI was a federal agency to which the Privacy Act applies. The D.C. Circuit's "substantial independent authority" test contradicts the older, more widely used "substantial federal control over day-to-day operations" test and is in clear derogation of the FOIA.[7]

II. THE DECISION BELOW, IN FOCUSING ON THE INDEPENDENT AUTHORITY OF THE SI TO DETERMINE ITS STATUS, IS IN DIRECT CONFLICT WITH THE TEST EMBRACED BY THE NINTH CIRCUIT.

Not only has the D.C. Circuit abandoned twenty years of precedent without explanation, but its analysis and result are at odds with the approach embraced by the Ninth Circuit. Such a clear disagreement between the circuit courts of appeals is appropriate for resolution by this Court.

A. The Ninth Circuit Applies A "Substantial Federal Control" Test In Defining "Agency" For The Purposes Of FOIA, Creating A Split In The Circuits Which The Court Should Resolve.

While the Ninth Circuit has not been called upon to determine whether or not the SI is an agency subject to FOIA, it has articulated its own test for defining "agency" for the purposes of FOIA. *See Irwin Memorial Blood Bank of the San Francisco Medical Society v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (*Irwin*). The Ninth Circuit, cognizant of the broad reach of FOIA, realized in *Irwin* that any determination of

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[7] While the court in *Rocap* gave extreme deference to the legislative intent underlying FOIA, as did the district court below, the *Dong* court cavalierly dismissed Congress' purpose in amending FOIA: "But Congress did not back this observation with any statutory text remotely matching its scope, such as 'governmental entity,' and accordingly we stick to the text as enacted." *Dong*, 125 F.3d at 880.

agency status has to be accomplished on a particularized basis because the government has adopted a "myriad of organizational arrangements" for accomplishing the business of government. *Id.* at 1054. In contrast to the D.C. Circuit, the Ninth Circuit has favored a more flexible approach that recognizes that certain entities may be agencies even if they do not promulgate widely applicable rules or punish offenders.

In this regard, *Irwin* teaches that to qualify as an agency under FOIA, a threshold showing of *substantial federal control* or supervision must be made. *See Irwin* at 1054. That showing may be made by examining a number of indicia which manifest that control. *Id.* at 1055. The Ninth Circuit embraced a control standard because the presence or absence of federal control distinguishes agencies from organizations which are "merely quasi-public or quasi-government." *Id.*

Applying its "substantial federal control" test to the Red Cross, the Ninth Circuit concluded that the Red Cross was not an agency subject to FOIA. *Id.* at 1057-1058. Thus, while the Red Cross holds a federal charter, its employees are not employees of the United States. *Id.* at 1056. Nor does the Red Cross receive any money from the United States except in terms of government contracts and grants. *Id.* Finally, government officials do not direct the everyday affairs of the Red Cross. *Id.* Without these factors indicating federal control, the Red Cross cannot be considered an agency under the *Irwin* test.

As the above discussion indicates, the two circuit courts which have addressed the issue of statutory construction presented by §§ 552(f) and 551(1) of title V have taken entirely different, and we believe, conflicting, approaches. The underlying theoretical premises are at odds with each other, with the Ninth Circuit favoring a substantial control test coupled with an expansive reading of FOIA, while the D.C. Circuit has now adopted an "independent authority" analysis and a narrow interpretation of FOIA.

These two approaches are clearly incompatible, and the Court should use this opportunity to define the proper test by which agency status should be evaluated.

B. Application Of The Test In *Irwin* To *Dong* Produces A Result Contrary To The D.C. Circuit's Holding, Demonstrating Their Irreconcilability.

Applying the test used in *Irwin* to the instant case leads to the conclusion that the SI is an agency subject to FOIA. In *Dong I*, in this regard, the district court employed the *Rocap* analysis, which the Ninth Circuit adopted in *Irwin* is holding that the Red Cross was not an agency for FOIA purposes. *Dong I*, 878 F. Supp. at 247. The *Dong I* Court found, based on factors which indicate federal control, that the SI has more numerous and stronger ties to the federal government than either the Red Cross or the FHLMC. Thus, like the Red Cross and the FHLMC, the SI is federally chartered. 20 U.S.C. § 41. And like the FHLMC its directors are either federal officers or appointed by federal officers. *See* 20 U.S.C. § 43 (Regents of the Smithsonian). Government officials on the Board of Regents include the Vice President, the Chief Justice of the United States, three members of the House of Representatives, and three members of the Senate. *See* 20 U.S.C. § 42. Federal officials exercise significant control over all aspects of the SI. *See Dong I*, 878 F. Supp. at 248-249.

Furthermore, the SI has even stronger links to the federal government because it has a majority of civil service employees, receives representation from the United States Attorney, enjoys sovereign immunity, and benefits from federal status for taxes purposes and property transfers. *See, e.g., Expeditions Unlimited*, 556 F.2d 289, 296 (D.C. Cir. 1977) (SI qualifies for sovereign immunity); *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992) (discussing an array of ties between the SI and the federal government); and *Matter of Smithsonian Institution Use of Appropriated Funds for Legal Representation of Of-*

ficers and Employees, 70 Comp. Gen. 647 (July 29, 1991) (Appropriated funds not available to provide litigative services to federal employees unless Attorney General determines such representation would be in the interest of the United States).[8] Using a substantial federal control approach, the shared similarities between the FHLMC and the SI warrant the conclusion that they are both agencies for the purposes of FOIA.

Moreover, the financial ties between the SI and the federal government are far more indicative of substantial federal control than those found in *Rocap* for the FHLMC. In this regard, the budget for the SI is published by the President through the Office of Management and Budget. In contrast to the FHLMC, the SI receives funds from the Treasury Department. Those monies account for about 75% of the SI's annual operating budget, and this year the SI received $333,408,000 in appropriations, excluding additional funds for the National Zoo, National Gallery of Art, the Kennedy Center, and the Woodrow Wilson International Center for Scholars. Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1587 (1997). The SI's funds come from appropriations specifically marked for *related agencies*.

Numerous other indicia cstablish that the government exercises substantial control over the SI. There is no dispute that the SI must be accountable for the monies it receives from the Treasury. *See* 20 U.S.C. §§ 49, 57. The SI must also comply with Federal Managers' Financial Integrity Act, which applies to executive agencies.

[8] The very fact that the Department of Justice, through the auspices of the Solicitor General's Office, is representing the SI in this case suggests that the SI *is* an agency. *See* 28 U.S.C. § 516 (". . . the conduct of litigation in which the United States, an *agency*, or officer thereof is a party . . . is reserved to the officers of the Department of Justice. . . .). Thus, the SI is in the awkward position of using government resources and lawyers to argue that it is not a federal agency.

See 31 U.S.C. §§ 1105, 1113, 3512 (governing budget submissions and accounting procedures). The General Accounting Office (GAO) audits the SI's accounts, like those of other executive agencies. *See Cotton v. Adams*, 798 F. Supp. at 24. Finally, the Office of the Inspector General exercises financial and operative oversight over the SI. *See* the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), *amended by* Pub. L. No. 100-504, title I, 102 Stat. 2515 (1988). Therefore, under a test which relies on the quality and breadth of day-to-day federal control to determine whether or not the SI is an agency subject to FOIA and the Privacy Act, the degree of financial control the government wields over the SI clearly would establish that the SI is an agency for the Acts' purposes.

The specific purpose of the SI's enabling legislation is the final factor under the *Irwin* analysis in determining whether substantial federal control exists over the Institution. Indeed, the SI's "authority," as the term is used in § 551(1), is its authority to execute its statutory duty of preserving and studying the nation's heritage. The actual enabling legislation for the SI was the 1846 incorporation of the Institution according to the terms of James Smithson's testamentary trust. *See* 20 U.S.C. § 41. At the time, the only statutory obligation was that the SI exist for the "increase and diffusion of knowledge. . . ." *Id.* However, as the SI has become more and more of a national institution, with the federal government providing the bulk of its funding, employees, and its collections, there has been a corresponding rise in particular legislation authorizing the SI to take specific actions.

First, the SI has been made the official repository of artifacts and other objects pertaining to the nation's cultural and scientific heritage either owned by or controlled by the government. *See, e.g.*, 20 U.S.C. § 50 (". . . all objects of art and of foreign and curious research, and all objects of natural history, plants, and geological and mineralogical specimens belonging to the United States"

to be delivered to the Board of Regents); 20 U.S.C. § 59 (collections of the National Ocean Survey and Geological Survey to be deposited in the SI); 20 U.S.C. § 60 (United States Army articles to be furnished to the SI); 20 U.S.C. § 77a (National Air and Space Museum to "memorialize the national development of aviation and space flight").

Second, Congress has specified how the SI is to execute its statutory duty. In general, the Board of Regents is charged with arranging and classifying its specimens as to best promote their study and examination. *See* 20 U.S.C. § 50. Congress has also been very specific in placing conditions on the SI's exercise of its authority. *See* 20 U.S.C. § 76j(b)(2((B) (an exception to section (b)(1), which prohibited the installation of further plaques and memorials in the Kennedy Center, to permit the placement of plaques on theatre chairs). Altogether, Congress intended that it continue to wield substantial control over the SI by imposing significant financial constraints and by carefully delegating and delineating the SI's original charter.

III. THE COURT OF APPEALS' DECISION SOWS CONFUSION WITH RESPECT TO THE LONG ESTABLISHED RELATIONSHIPS BETWEEN THE SI AND OTHER AGENCIES.

Rather than settling a controversy, the D.C. Court of Appeals' holding serves only to confuse the SI's relationship with other government agencies. Finding that the SI is not an "agency" within the FOIA's definition—which is construed by virtually every court to be an inclusive one —jeopardizes the long established relationships the SI currently enjoys with the other executive agencies that oversee the SI's actions towards its employees.

A. The Petitioned-From Decision Specifically Contradicts The Federal Labor Relations Authority's Finding That The Kennedy Center, And By Extension, The SI, Is An Executive Agency.

Using a more restrictive definition than the definition of "agency" in the APA, the Federal Labor Relations

Authority (FLRA), which administers the federal sector labor-management statute, held that the Kennedy Center and the SI were *executive agencies*, thus meeting, for the purposes of the instant case, the criteria of not only § 551(1) but § 552(f), as well. Section 552(f) was the supplemental language added to FOIA as part of the 1974 amendments and defined agency to include executive departments and other establishments in the executive branch. *See* 5 U.S.C. § 552(f). Congress has defined "independent establishment" as an "establishment in the executive branch which is not an Executive Department, military department, Government Corporation, or part thereof, or part of an independent establishment." 5 U.S.C. § 104(1).

Using the § 104(1) definition, the FLRA held the SI to be an independent establishment, meaning that it was an executive agency for the purposes of Title V, which would include FOIA and the Privacy Act. The FLRA assessed the status of the SI when the Kennedy Center, a bureau of the SI, challenged the FLRA's jurisdiction to hear an unfair labor practice charge. *See The Kennedy Center for the Performing Arts and Rebecca L. Wood*, 45 F.L.R.A. 835, 836-837 (1992) (*Kennedy Center*).

First, the FLRA looked to the establishment of the SI. Citing the multitude of ties to the federal government that the petitioner and the lower court also found compelling, the FLRA concluded that the SI met the test for government agency status. *See Kennedy Center* at 845.

Next, the FLRA assessed whether or not it had jurisdiction over the federal entity that is the SI by virtue of its authority over the labor-management relations of executive agencies. The FLRA was created as part of the Federal Labor Management Relations Statute (FSLMRS) that was itself part of the comprehensive Civil Service Reform Act of 1978 (CSRA). *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, §§ 7100 *et seq.* (1978). The FSLMRS covers employees in "agencies," which the statute defines as an "executive agency." 5 U.S.C. § 7103(a)(3). The FLRA supplemented the defi-

nition found in § 7103(a)(1)(3) with the general definitions for the title found at § 105, and particularly § 104 (defining independent establishment), which are the same sections used to explicate the term "agency" for purposes of FOIA and the Privacy Act.

Congress did not derive these definitions independently but instead codified the language used in the Executive Orders which had previously governed labor-management relations in the federal sector. *See* H.R. REP. No. 1403, 95th Cong., 2nd Sess. 12 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT, 1978, at 682 (1978) (LEGIS. HIST.). Originally the term "agency" in Executive Order No. 10988 referred to "agencies in the executive branch . . . in all dealings with Federal employees. . . ." Preamble, Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962), *reprinted in* LEGIS. HIST., 1978, at 1211 (1978). President Kennedy's use of the term "federal employees" meant that he wanted to be inclusive; he did not use the term "executive branch employees." Under this first Executive Order, approximately 900 SI employees received union representation. *See Kennedy Center* at 847. Indeed, under the separation of powers doctrine, Executive Orders only have authority over organizations in the executive branch. Arguably, by acceding to Executive Order No. 10988 the SI was accepting its status as an entity in the executive branch.

Building upon Executive Order No. 10988, President Nixon promulgated Executive Order No. 11491 in 1970, which governed labor relations in all agencies and employees except for those specifically excluded in the Order. *See* Exec. Order No. 11491, 24 Fed. Reg. 17,605 (1970), *reprinted in* LEGIS. HIST. at 1245-1246. For the first time, "agency" was specifically defined, and it cross-referenced the definition of "independent establishment" found at 5 U.S.C. § 104. *Id.* at 1244. At this time, the number of employees at the SI represented by unions grew to over 1000, and the SI continued to be within the coverage of Executive Order 11491. *See Kennedy Center* at 848.

Considering that Congress had clearly looked to the existing Executive Order in passing the CSRA and had enumerated excluded agencies, the FLRA concluded that Congress meant for the SI to remain within the ambit of the federal labor-management relations program. *See Kennedy Center* at 851. Thus, the SI's belated contention that it is suddenly not an executive agency belies over thirty years of practice and defies Congressional intent.

B. The D.C. Circuit's Holding Potentially Undermines The Coverage Of The SI's Employees Under The FSLMRS And Other Federal Employment Law.

The FLRA's assertion of jurisdiction protects the approximately 4,000 SI employees not paid from the Smithson Trust. *See* 5 U.S.C. §§ 7100 *et seq.* According to the FLRA's General Counsel, the National Labor Relations Board (NLRB) has declined to assert jurisdiction over the Kennedy Center under the National Labor Relations Act (NLRA). *See Kennedy Center* at 842. Therefore, a finding that the SI is not an agency for FOIA or Privacy Act purposes potentially threatens coverage of the SI by the CSRA and might thereby leave the SI's employees without recourse to either private or public labor law. Because SI employees have enjoyed the rights to organize and collectively bargain since the early 1960's, as repeatedly affirmed by the afore-mentioned Executive Orders and CSRA, the instant decision sows confusion in an area where long-established precedents have affirmed the FSLMRS' applicability to the SI's majority, non-trust fund employees.

In taking the position that it is not an agency for FOIA and Privacy Act purposes, moreover, the SI both undermines federal labor-management relations and fails to appreciate the significant benefits it derives from its status as an agency, relative to its employees, if they are "agency" employees. Thus, as employees of a government agency, workers at the SI have no right to strike. *See* 5 U.S.C. § 7311(3). This is decidedly contrary to the right of private sector employees to strike. *See* NLRA § 7, 29 U.S.C. § 157; *Division 1287 of Amalgated Ass'n. of St.*

Elec. Ry. and Motor Coarch Employees of America v. Missouri, 374 U.S. 74 (1963). Also, like other federal agency employees, workers at the SI until now have been subject to the provisions of the Hatch Act, which prohibit political activity in the federal government. *See* 5 U.S.C. §§ 7322-7324. Finally, the SI enjoys the benefit of statutorily limited wages and benefits. Since its employees cannot bargain over wages or benefits, the SI reaps a significant savings each year, as federal employees in Washington, D.C. (where the majority of SI employees work), are paid, on average, 31% less than their private sector counterparts. *See* U.S. Pay Agent, *Report on Locality-Based Comparability Payments for the General Schedule, Annual Report of the President's Pay Agent* 18 (Washington: 1993-1997). *See also* Federal Employment Pay Compensation Act of 1990 (FEPCA), Pub. L. No. 101-509, § 529, 104 Stat. 1427, 1429 (1990) (calling for equalization of pay between federal and private sector workers). If the SI is not an "agency" for FOIA or Privacy Act purposes, its status as a government employer for purposes of the important limitations on employee rights may be questionable.

Furthermore, the *Dong* court's holding that the SI is not an executive agency threatens the SI's relationship to the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). The MSPB has been responsible for assuring SI compliance with merit systems principles. *See, e.g., Hawkins v. SI*, MSPB. Docket No. DC-0752-96-0283-B-1 (March 17, 1998) (petition for review denied as untimely); *Johnson v. SI*, 74 M.S.P.R. 94 (1997). Not only has the MSPB asserted *de facto* jurisdiction by hearing and rendering decisions in SI employment cases, but it has also found itself to have *de jure* jurisdiction. In *Pessa v. SI*, for example, the MSPB explicitly held the SI to be an independent establishment and thus an executive agency for purposes of the Whistleblower Protection Act, 5 U.S.C. §§ 1221, 2302(b). *Pessa v. SI*, 60 M.S.P.R. 421 (1994). *See also Seigla v. SI*, 62 M.S.P.R. 55, 57 (1994) (SI an

agency under 5 U.S.C. § 105). A judicial determination that the SI is not an executive agency potentially subverts the jurisdiction of the agency responsible for adjudicating violations of the merit systems principles and may upset employees' reliance on the employment protection they have heretofore been entitled to as federal agency employees.

In addition to the protection offered by the MSPB, SI employees have previously depended on the EEOC to protect them from discrimination in employment. The Office of Federal Operations (OFO) of the EEOC has consistently ruled on allegations of discrimination in the SI. *See, e.g., Adams v. SI*, EEOC Appeal No. 01971599 (December 5, 1997); *Prue v. SI*, EEOC Appeal No. 01955625 (September 5, 1997); and *Penn v. SI*, EEOC Appeal No. 01956889 (July 14, 1997). However, the Secretary of the SI has intimated that the holding in *Dong* means that the SI no longer has to comply with the orders of the OFO, a move which would potentially expose thousands of SI employees to what would otherwise be illegal harassment and discrimination. *See* Jacqueline Gaulin, *Smithsonian Employees in Limbo, EEOC's Case Refusals Raise Questions About Rights*, FEDERAL TIMES, March 23, 1998 at 5 (Reporting on EEOC decision to return 40 pending EEO cases to the SI until the jurisdictional issues raised because of the D.C. Circuit's holding in *Dong* are resolved).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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